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WITH

ANNOTATIONS

SHOWING THEIR PRESENT VALUE AS AUTHORITY

REPORTED AND EDITED BY

PETER V. ROSS

Of the San Francisco Bar

Author of "Inheritance Taxation," "Probate Law and Practice," etc.

VOLUME 3

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In re CASTLE DOME MINING & SMELTING CO.

No. 11,130; June 25, 1888.

18 Pac. 794.

Insolvency—Jurisdiction—Foreign Corporation.—Under the insolvency act of 1880, which provides, in section 8, that the petition shall be filed in the county where the debtor resides, or has his place of business, and, in section 21, makes certain provisions in case of a nonresident debtor, the California courts have jurisdiction of proceedings in involuntary insolvency against a foreign corporation which has property and a place of business in the state.

APPEAL from Superior Court, Alameda County; N. Hamilton, Judge.

Olney, Chickering & Thomas for appellants; Clunie & Knight and Wm. H. Sharp for respondents.

HAYNE, C.—This is an appeal from an order of the superior court of Alameda county dismissing proceedings in involuntary insolvency for want of jurisdiction. The corporation against which the proceedings were commenced was organized under the laws of New York, and had its principal place of business there. Its mine was in Arizona, but its smelting works were situated and operated in Alameda county. No question arises, on this appeal, as to the validity of a discharge in case one shall be granted. The primary

object of proceedings in involuntary insolvency is to have the proceeds of the property of the insolvent within the state distributed among the creditors in the manner pointed out in the statute. The granting of a discharge to the insolvent is a separate matter. The property may be taken, and its proceeds distributed among the creditors, although the insolvent be found to be not entitled to a discharge, and never gets it. If, therefore, the court had jurisdiction to distribute the proceeds of the property, its order was erroneous, irrespective of the question whether it could grant a discharge which would be valid out of the state. Now, in the first place, we think there can be no question as to the power of the state to pass a law to the effect that upon the insolvency of a corporation, domestic or foreign, its property within the state shall be taken, after due service of process, and the proceeds distributed among its creditors. It certainly has as much power to do that as it has to provide that the proceeds of the property shall be given to the creditor or creditors who shall have succeeded in getting an attachment. It is a mere question as to the remedy for the enforcement of the insolvent's obligations. As a matter of course, there must be due service of process. But the insolvency act provides for such service, and it is not disputed that due service was had in this case, the order to show cause having been served upon the president and upon the general manager within this state. In the second place, we think that the insolvency act of 1880 is such an act. The position of the respondents in this regard is not that the act does not apply to corporations. Such a position could not be taken, because the act is expressly made applicable to corporations: Section 36. The argument is that, upon a proper construction of the act, it must be held to apply only to residents of the state, and that a foreign corporation having its principal place of business elsewhere is not a resident of the state. However this may be with respect to voluntary, we do not think it so as to involuntary, insolvency. The provision relied upon is that the petition "must be filed in the superior court of the county, or city and county, in which the debtor resides, or has his place of business": Section 8. It will be observed of this provision that residence is not the only condition mentioned. The petition may be filed where the debtor "has his place of business." And, when this provision is read

in connection with subdivision 3 of section 21 (which speaks of certain things which may be done "in case of a nonresident . . . . debtor"), it seems plain that the proceedings may be commenced against a nonresident, at all events if he has a place of business here. The corporation has a place of business in Alamada county; and, as this place of business is its only one in the state, it must be considered its principal place of business, so far as this state is concerned. In the language of one of the papers introduced in evidence by the respondents, it was "a corporation duly organized and existing under the laws of the state of New York, and whose principal place of business, within the limits of said state of California, is located in said county of Alameda." No question is made as to the regularity of the record on appeal. We therefore advise that the order appealed from be reversed and the cause remanded for further proceedings.

I concur: Foote, C.

Belcher, C. C., took no part in this opinion.

PER CURIAM.—For the reasons given in the foregoing opinion the order is reversed and the cause remanded for further proceedings.

BRALY v. HENRY.*

No. 12,402; June 25, 1888.

18 Pac. 798.

Negotiable Instruments—Bona Fide Holder—Evidence.—In an action on a note, where the question is whether or not plaintiff is an innocent holder for value, interrogatories whose evident purpose is to show that plaintiff took the note with notice of a partial failure of consideration, it having been held on a former appeal of the case that such partial failure of consideration was a defense pro tanto, are allowable, although defendant is precluded from questioning plaintiff's ownership of the note by the fact that the pleadings admit that it was indorsed and delivered to him.

*For subsequent opinion in bank, see 77 Cal. 324, 19 Pac. 329.

court of California. Having testified in his own behalf, he was cross-examined as follows: "Did you receive that warrant from the treasurer—No. 8706? Is that your signature on the back of that warrant?" The defendant objected to the question on the ground that it was not proper cross-examination, it is not the warrant of the state, and it is irrelevant and immaterial. The court overruled the objection, and allowed the question, to which ruling the defendant then and there excepted; and, the question being repeated, the defendant declined to answer on the ground that the answer would tend to convict him of a felony, under instructions of his counsel, and his statement that if witness answered the question he would leave the case. The court permitted the witness to decline to answer on the grounds given, and on no other grounds. The district attorney, subject to the same objection, ruling, and exception, and the further objection that it is improper to ask a question lumping all the warrants together, asked the following question: "Did you receive the money on each one of these warrants, 1692, 3181, 1233, 4000, and 4727?" The witness declined to answer, for the same reason given above. "Question by District Attorney: How much money did you owe to Mr. Hellman of Los Angeles? How is it that you did not pay them all? Mr. Baggett for Defendant: You can take the benefit of the instruction given you by counsel, and not answer that 'question.' The Court: I will allow the question. By Mr. Graves, District Attorney: You decline to answer the question? A. Yes, sir. Q. On the ground that it would tend to criminate you? A. Yes, sir; of another crime. Q. I notice that in the month of October, 1885, here, which corresponds to the voucher here, you have got eleven of them marked 'Paid,' and fourteen, 'Unpaid.' What did you do with the balance of that money? Mr. Ferral: We object, as not being cross-examination at all. The Court: I think it comes under the line of cross-examination. The objection is overruled. Mr. Ferral: Note an exception. Q. Where did you get that money? Mr. Ferral: That is the same thing. This is not cross-examination, but in furtherance of their own examination."

W. T. Baggett, W. W. Foote and T. C. Coogan for appellant; George A. Johnson, attorney general, for the people.

PER CURIAM.—The court is of opinion that the cross-examination of defendant was without error. We find no error in the record and the judgment and order are affirmed.

McFarland, J., dissenting.

GAGE et al. v. DOWNEY et al.*

No. 12,377; August 20, 1888.

19 Pac. 113.

Judgment — Res Adjudicata.—Plaintiff Alleged, in an Action against her husband's administrator for certain land, that her husband, who owned no property, acquired title to the land in question under a mortgage which he took to secure a loan of her money. It appeared that he acquired title to part of the land under the mortgage, and to the remainder by deed. Held, that a decree in plaintiff's favor for the entire tract is conclusive of her right thereto as against her husband's estate.

Judge—Disqualification—Removal of Cause—Validity of Judgment.—Where a case is transferred, because of the disqualification of the judge, to an adjoining judicial district, such court acquires jurisdiction, the judge having had authority under the statute to make the transfer, though the county was not the nearest one to which the case might have been transferred; and its judgment cannot be collaterally attacked.

Ejectment—Defenses—Agreement to Convey Part of Land to Attorney.—An agreement by plaintiff to transfer part of the land sued for, when recovered, to his attorneys, for their services, is not a defense to such action, even if within the prohibition of the statute forbidding attorneys to buy any thing in action.

Appeal—Objections not Raised Below.—Where it is not objected, at the time a motion for a new trial was passed on, that notice of motion was not given, it will be presumed on appeal that the notice was given.

APPEAL from Superior Court, San Diego County; W. T. McNealy, Judge.

Action by Henry T. Gage and Cornelia Rains de Foley against John G. Downey and the Merchants' Exchange Bank

*For subsequent opinion in bank, see 79 Cal. 140, 21 Pac. 855.

of San Francisco to recover certain land. There was a judgment for defendants, and plaintiffs appeal. The contract between plaintiffs and Glassell, Smith & Patton, referred to in the opinion, was that plaintiffs should convey a portion of the lands sued for, when recovered, to said Glassell, Smith & Patton for their services as attorneys in the action. Penal Code, section 161, forbids any attorney to buy or be interested in buying any evidence of debt or thing in action.

Glassell, Smith & Patton and Henry T. Gage for appellants; Levi Chase, Bicknell & White and O'Brien & Morrisson for respondents.

THORNTON, J.—We see no ground to dismiss the appeals herein or either of them. Admitting that the notice of intention to move for a new trial is no part of the record, because not made such by bill of exceptions or statement, still it is evidence that the motion was submitted and denied by the court, at which time the respondents (defendants in the court below) were represented by their attorney, Levi Chase, Esq. This is shown by the order denying the motion for a new trial, entered in the minutes of the court on the 29th of August, 1887, which is as follows: "The defendants being present by L. Chase, Esq., their attorney, the plaintiff's motion for a new trial being now submitted is at this time denied by the court." The record shows no objection to the submission of this motion on the ground that no notice so to move was served and filed in time. Under these circumstances, it would be manifestly unjust to hold that the court below did not acquire jurisdiction of the motion, or to dismiss the appeal from the order denying the motion for a new trial. Every intendment sustains the action of the court. The failure to object, and the action of the court in passing on the motion and not dismissing it, afford an irresistible presumption that all things were regularly done; that the proper notice of intention had been given, and the statement regularly prepared. It follows from the foregoing that the motion to dismiss either appeal must be denied.

The plaintiffs in this cause are Henry T. Gage and Cornelia Rains de Foley, and the defendants are John G. Downey and the Merchants' Exchange Bank of San Francisco. The

action is ejectment to recover possession of an undivided one-half of a tract of land situate in San Diego county, known as the "Rancho Valle de San Jose," for which a patent was issued by the United States on the 10th of January, 1880, to Sylvestre de la Portilla, and also an undivided twelve twenty-fifths of a tract of land situate in the same county, known as the "Rancho Valle de San Jose," for which a patent was, on January 16, 1880, issued by the United States to J. J. Warner. Judgment was rendered for the defendants. The plaintiffs moved for a new trial, which was denied. The latter prosecute the appeals herein from the judgment and order denying a new trial.

On the 16th of April, 1836, a grant was made to Sylvestre de la Portilla by N. Guiterrez, political chief, of the place called "Valle de San Jose," containing four square leagues. On the eighth day of June, 1840, a grant was made to Jose Antonio Pico by Juan B. Alvarado, governor of California, of the place called "Agua Caliente," to the extent mentioned in the plan accompanying the expediente. On the twenty-eighth day of November, 1841, a grant was made to J. J. Warner by Manuel Micheltorena, governor of California, of the place called "Valle de San Jose," containing six square leagues, more or less. The grants to Portilla and Warner were confirmed, and patents were issued to them severally, as above set forth. The grant to Pico was rejected. On the 6th of November, 1858, Portilla conveyed all his interest in the rancho to one Vicente S. de Carillo. Some time prior to 1856, say in 1854, J. J. Warner mortgaged his rancho Valley of San Jose to J. Mora Moss. Suit was brought to foreclose this mortgage in the district court for San Diego county. In this action a homestead was set apart by the court to Warner and wife. This homestead tract is described in the decree, and is a portion of the southwestern part of the ranch, a tract said to be a league, and was directed to be sold under this decree to satisfy Moss' mortgage. This latter tract is described in the decree. It does not appear that the league was ever sold. This decree seems to have been entered in 1856. Surely, in the absence of proof, it may be conclusively presumed that Moss' debt was paid to Warner, and that this league was never sold. The homestead set apart included the whole of Warner's ranch except the league above mentioned. This is manifest

from the report of the commissioners who set apart the homestead, and the order of the court confirming it. Surely, if the homestead did not include the whole ranch except the Moss league, the part ordered to be sold would have exceeded one league. On the 20th of November, 1858, the above-named Warner and his wife, Anita Warner, executed a mortgage to John Rains of all their interest in the land granted to him. The description of the land included in this mortgage is as follows: "All the right, title, and interest of the parties of the first part of, in, and to that certain tract of land lying, being, and situate in the county of San Diego, Cal., known as the 'Valley of San Jose and Agua Caliente,' and being the lands granted to Jose Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by deed of grant of date of June 8, 1840, and to Juan J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date of November 28, 1844, reference being had for a more particular description to the several grants, expedientes, maps, and other papers on file in the office of the surveyor general of the United States for California, in the city of San Francisco, and in the office of the clerk of the district court of the United States for the Southern district of California, in the city of Los Angeles, forming the record of case No. 254 on the docket of the United States land commission, and of case No. 218 on the land docket of said district court; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining." On the 5th of July, 1861, the above-named Carillo conveyed to John Rains the undivided one-half of the (Portilla) rancho, previously conveyed to him by Portilla. The mortgage of Warner and wife to Rains was subsequently foreclosed, and the mortgaged premises sold under the decree of foreclosure by George Lyons, sheriff of the county of San Diego, to Rains; and on the 18th of November, 1861, the sheriff aforesaid, in pursuance of the decree and sale to Rains, executed to him a deed of the mortgaged premises above mentioned. The description in the sheriff's deed of the property conveyed is as follows: "All the right, title, and interest of said defendants of, in, and to that certain tract of land lying and being situate in the county of San Diego, state of California, known as the 'Valle de San Jose and Agua Caliente,' and being the land

granted to Jose Antonio Pico by Juan B. Alvarado, governor of department of the Californias, by deed of grant of date January 8, 1840, and to John J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date November 28, 1844; reference being had for a more particular description to the several grants, expedientes, maps, and other papers on file in the office of the surveyor general of the United States for California, in the city of San Francisco, and in the office of the clerk of the district court of the United States for the Southern district of California, in the city of Los Angeles, forming the record of case No. 254 on the docket of the late United States land commission, and of case No. 218 on the land docket of said district court; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging. . . . ." The mortgage of Warner and wife to Rains included the whole ranch granted to Warner; and Rains, under the decree of foreclosure, acquired title to the whole of it, and of this we have no doubt. The decree directs the whole to be sold and conveyed by the sheriff. The description in the mortgage and sheriff's deed are given above. The Moss league also passed to him under this mortgage, decree, and deed. At the time of the making of the foregoing documents, the Moss league had not been sold, and Rains took the title to Warner's ranch, presumably encumbered as to this league. As this was paid off he took title to the whole of Warner's ranch. By the deed from Carillo and wife he was invested with the title to the undivided one-half of the Portilla ranch, and the legal title to Warner's ranch and the above one-half of the Portilla grant was in him when he died, in November, 1862. These interests descended to his wife and children, unless the latter were devested of them by proceedings which will be hereafter referred to.

Before Rains took the mortgage above mentioned from Warner and wife, he had, on the 16th of September, 1856, intermarried with Maria Merced de Williams. He died on the 17th of November, 1862, leaving surviving him his wife above named, and five children, named Cornelia (who is one of the plaintiffs), Isaac, Robert, John, and Francisca, the latter born after the death of her father. Isaac died in 1877 intestate, unmarried, and without issue. On the 21st of February, 1863, Maria Merced, the above-named widow of John Rains, com-

menced an action in the district court of the county of San Bernardino against E. K. Dunlap, administrator of John Rains, deceased, and her children above named and others, in which she set forth her marriage with John Rains on the 16th of September, 1856; that Rains then had but an inconsiderable amount of property, which he afterward expended; that Rains acquired money by the sale of her separate property; that on the 29th of November, 1858, he lent to J. J. Warner the sum of $1800, to secure the payment of which he received from Warner and his wife a mortgage of certain property, describing it as follows: "All their right, title, and interest in and to that certain tract of land lying and being situate in the county of San Diego, Cal., known as the 'Valle de San Jose and Agua Caliente,' and being the lands granted to Jose Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by deed of grant of June 8, 1840, and to John J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date November 28, 1844"; the property and right included in said mortgage being all that part of said rancho "Valle de San Jose and Agua Caliente," lying to the north and east of the east and west and north and south lines drawn from the tree marked "W," mentioned in the complaint, instead of the one square league lying to the south and west of said two lines. The line referred to marked "W" is described as an oak, standing on the east and in contact with the rocks, forming the first rocky point on the south side of the meadow valley, which extends eastwardly from the rocky hill at San Jose Indian village to Buena Vista. (The above description is combined from the original and amended complaint, in accordance with what appears in the transcript.) Other property is mentioned in the complaint which it is not necessary to describe. The complaint further avers that Rains proceeded in due course of law to foreclose this mortgage against Warner and the heirs of his wife, then deceased; that at the sale under the decree of foreclosure Rains became the purchaser, and thereafter in due time received the sheriff's deed for such premises. It was further averred that the money lent by Rains to Warner, and for which the mortgage was taken from Warner and wife, was the separate property of the then plaintiff, Maria M. Williams de Rains; that Rains paid no

money for the property purchased at the sheriff's sale above mentioned; and that the amount paid was the amount found by the court due on the mortgage foreclosed; that no part of this money had ever been given to Rains by the plaintiff, his then widow, nor did it belong to him in any way; that she was informed by Rains that the sheriff's deed for the mortgaged property aforesaid had been executed to her as grantee. She avers that the property became her separate property, and asks that the court decree the property included in the aforesaid deed of the sheriff of San Diego county to be hers, as against the defendants, with the common general prayer for all other and further relief to which she may be entitled. The district court for San Bernardino county found the facts as alleged by plaintiff in regard to this property, and decreed it to be her separate property. And it was further adjudged by same decree that defendant E. K. Dunlap, administrator of John Rains, deceased, execute and deliver to the plaintiff all necessary deeds, etc., to carry the decree into full effect. This decree was entered and filed on the 13th of March, 1863. On the next day the deed of the property described in the complaint was executed to plaintiff Maria Merced, by the administrator, as required by the decree. On the 14th of March, 1863, the above-named Maria Merced conveyed to her children, Cornelia, Isaac, Robert, John Scott, and Francisca Rains, by deed, all of the estate above mentioned, conveyed to her by deed of Dunlap, administrator, just above set forth. On the 2d of April, 1864, the aforesaid Maria Merced, widow of John Rains, commenced an action in the district court for the county of Los Angeles against Dunlap, in his individual capacity, and also as administrator of John Rains, deceased, Robert S. Carlisle, individually and as trustee, Cornelia Rains, Isaac Rains, Robert Rains, John Scott Rains, Francisca V. Rains, and others as defendants. On the twenty-sixth day of November, 1864, on the affidavit of plaintiff's attorney that the judge of the district court for the first judicial district, of which the county of Los Angeles formed a part, was disqualified from acting in the case by reason of consanguinity, on motion of said attorney the cause was removed for trial to the district court of the third judicial district for Santa Clara county. No objection was made to this order. The papers in the cause were thereafter transmitted to the district court

for the county last named, and filed therein on the fourth day of January, 1865. No motion was made to remand this cause to the district court for Los Angeles county, and it remained for trial, and was tried in the court to which it had been by the order transferred. On the 9th of May, 1865, an amended complaint was filed by the plaintiff, who had, since the commencement of the action, intermarried with Jose C. Carillo. The object of this suit was to have set aside the conveyance to her children as having been procured from her by fraud and undue influence, and also to set aside a power of attorney, executed to Robert S. Carlisle, which she had revoked, and for an account from Carlisle, etc., and for general relief. The property averred to have been conveyed by the deed sought to be set aside by this suit is set forth in the complaint, and is described in full. It consists—First, of the Cucamonga ranch, situate in the county of San Bernardino; second, the Bella Union Hotel, situate in the city of Los Angeles; third, a lot in the city just mentioned, which was conveyed to Rains by Alice Flashner by deed dated August 11, 1862; and, fourth (we here insert the description in same words as in complaint), "all that certain tract of land situate in the county of San Diego, state aforesaid, known as 'San Jose del Valle and Agua Caliente,' same set apart as a homestead for Jonathan J. Warner and wife, by decree of the district court of San Diego county on September 24, 1856, and known also as 'Warner's Rancho' "; fifth, certain personal property. The above is alleged in the complaint to have been decreed to be her separate property by the decree in the San Bernardino action. Dunlap, Carlisle, and the infant children of said plaintiff, by their guardian ad litem, all answered the complaint. The case was tried, and on the twenty-seventh day of May, 1867, a decree was made and entered setting aside the deed above mentioned made by plaintiff to her children as having been obtained by fraud, and it was ordered that the same should be delivered up and canceled, also setting aside the power of attorney to Carlisle. The decree then proceeds to distribute the property in the action between the plaintiff and her children, defendants above named. Certain property is distributed to the children, and adjudged to belong to them, and certain other property to the plaintiff as hers. The respective interests are clearly

designated and described in the decree, and possession is awarded to each of the parcels so decreed to them. Among other parcels of land awarded to the plaintff is one designated in the decree in words following: "Second. And also all that tract of land situate in the county of San Diego, state of California, and known as the 'Rancho San Jose del Valle' (or 'Warner's Ranch'), being the same rancho finally confirmed to J. J. Warner, and surveyed under instructions from the United States surveyor general of California by John C. Hayes, in July, 1859, and said survey was approved March 3, 1860, by T. W. Manderville, United States surveyor general of California." On the 3d of December, 1868, Maria Merced Williams de Carillo executed to C. V. Howard, P. Beaudry, M. F. Coronel, J. S. Downey, and J. S. Garcia, a deed of "all that certain tract of land or rancho situate in the county of San Diego, state of California, known by the name of 'San Jose del Valle,' or 'Warner Ranch,' and also known by the name of 'San Jose o Tagui,' and being the same tract of land or rancho confirmed by the United States land commission and United States district court to J. J. Warner, in the case of J. J. Warner vs. The United States, to the papers in which case reference is hereby made for a more particular description."

It is admitted that defendants succeeded to an undivided half of the Portilla grant by deed of V. S. de Carillo, executed on the 20th of February, 1869, to C. V. Howard et al., and is not involved in this suit. Of the children of Maria M. W. de Rains above mentioned, Isaac died in 1877, intestate, unmarried, and without issue. It is said by counsel for plaintiffs that the interests of Robert, John, and Francisca, who married the plaintiff Gage, if any they had, became vested before the beginning of this action in the plaintiff just above named. Defendants claim title under the decrees above set forth, rendered in the San Bernardino and Santa Clara cases, and conveyances subsequently made.

It is averred by plaintiffs that the title under the Portilla grant was not embraced in the San Bernardino case. In this contention we cannot concur. The claim preferred by Mrs. Rains in this suit was for the whole of the Warner ranch, except the Moss league, which league, in the final survey, was not awarded to Warner. The reference to the grant to War-

ner and the homestead set off to him in the action of Moss v. Warner and wife was mere matter of description, to identify the land which she claimed. There was no intention to do what is most unusual and entirely unnecessary to deraign and set forth her chain of title in the complaint. The complaint means that John Rains bought this land with money which was part of plaintiff's separate estate; that it belonged to her in fee, and should be conveyed to her. It states that the property included in the mortgage to John Rains is a certain part, viz., that set off as a homestead in the action of Moss v. Warner. That is the tract claimed by her in the action and so declared in the complaint. The word "right," connected with "property," in the complaint, does not give a different meaning to what is claimed by the complaint. The language used amounts to stating that the right involved and claimed here is the right to the tract set apart as a homestead, described in the pleading. The decree of the court, and the deed of Dunlap, administrator, accord with this view, as will be seen by the reference to them. The complaint intended to challenge John Rain's right and title to this land, and to bring them to judicature, and this we think was done by the pleader. So that the parties claiming under Rains might deny by their answer her right to the land, and offer in evidence any title, whether derived from Portilla or anyone else, to the land, which would show the land to be a part of his estate. The title to the land was in controversy in this suit as between the personal representative and the children of John Rains on the one hand, and his widow on the other, and it was determined in favor of the widow (plaintiff). John Rains acquired his interest in the Portilla grant after his foreclosure at the sheriff's sale under the decree of foreclosure in the action to foreclose his mortgage taken from Warner and wife; and if, after Mrs. Rains obtained the deed of the administrator under the decree in the San Bernardino case, she had brought an action against John Rains to recover the land embraced in the decree, and he had set up against her his Portilla title, she might have defeated it, if not by the decree just above mentioned, by showing that the Portilla interest was acquired by him with money belonging to her as her separate estate; and we are of opinion that the defendants could, in this action, do the same against the plaintiffs to defeat their

right to any portion of the land included in the Warner patent. In our judgment the decree under consideration conclusively determined that the land embraced in it belonged to Mrs. Rains, and that the estate of Rains had no title to it acquired from any source, whether Portilla, or Pico, or anyone else. Under this decree in Mrs. Rains' favor, she executed the deed to her children, under which plaintiffs herein claim.

It is contended on their part that the judgment in the case tried in Santa Clara, setting aside this deed, is void for want of jurisdiction in the district court of Santa Clara county. This contention we propose now to consider. The objection made to the jurisdiction of the court is put on the ground that the judge had transferred the cause to the district court of a county—Santa Clara—which court was not the nearest court to Los Angeles county, where the like cause or objection for making the order did not exist. The same cause and objection here existed as to every county in the first judicial district; therefore it would have been error to transfer it to a court in a county in that district. The judge then had to select a court of a county not of the first district. The nearest district courts then were in the third judicial district, at that time composed of the counties of Monterey, Santa Cruz, Santa Clara, and Alameda. Conceding that the county seats of Monterey and Santa Cruz were nearer to Los Angeles county in a straight course than that of Santa Clara county, still, as the county seat of the latter was nearer by the usually traveled route, or more accessible, might it not be reasonably concluded that the district court of Santa Clara was the nearest? But waiving this, we are of opinion that, conceding that the county seat of Monterey or Santa Cruz was nearer than that of Santa Clara to Los Angeles county, that the order sending it to the district court of the latter county was only error. We cannot see how it can be law that a judgment can be impeached collaterally and held void, because a judge has made an inconsiderable mistake in computing distances, or had selected a county seat more readily accessible than the others in coming from Los Angeles, and holding it to be really the nearer on that account. The judge had jurisdiction to make this order, under the statute then in force. He must determine what is the nearest court in administering the law. This

determination was undoubtedly within his power (Stats. May 6, 1854; Stats. 1864, p. 153; Hitt. Gen. Laws, par. 5600); and if he sent it to a county some distance farther than another by error of a miscalculation of distances, it would be nothing more than an error, and should not render the judgment void. Conceding that this judgment might have been reversed on appeal, still it would not be void on collateral attack. The cases cited by the counsel for plaintiffs (appellants here)—Burton v. Covarruhias, decided at the April term, 1865 (not reported); People v. De la Guerra, 24 Cal. 73; Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848; and People v. McGarvey, 56 Cal. 327—are not at all in point. They are all on appeal or direct attack. No collateral attack was attempted in either case, and in every case except People v. McGarvey they were orders not of transfer, but orders in the cause, involving judicial action of different kind than that of transfer, which the judge was expressly forbidden by statute from making. People v. McGarvey related to a criminal case transferred under a state of facts not allowed by the statute relating to such cases—a statute entirely different from the act under which the judge proceeded in this case, as is apparent from the opinion in the case. There was no appeal in the Santa Clara case. In fact, the adverse parties therein did not object to the order, did not move to vacate it, nor to remand the cause in the Santa Clara court, but acquiesced in the judgment. We do not think the contention of the appellants is sustainable. The judgment is not open to attack for the reason urged by them.

The plaintiff in the case tried in Santa Clara county relied on the judgment recovered in the San Bernardino case, which, as we have seen, determined that the whole of the Warner ranch, except the Moss league, was hers, as against any title derived from any source or anyone else, and the decree in the Santa Clara case set aside the deed to her children and determined certain land to belong in fee to the plaintiff therein, Mrs. Carillo, formerly Rains. It makes no difference that the decree assumed the form of a partition of the property involved in the cause between the plaintiff and her children. It set aside the deed to the children, and, conceding that the decree in other respects was void, it was not void so far as it set aside this deed. The Warner ranch, except the Moss

league, then remained in her under the San Bernardino decree, and the administrator's deed made in pursuance thereof. We do not think that it is averred in the complaint in the Santa Clara cause that the judgment in the San Bernardino cause was obtained and entered by collusion of any kind. The arrangement between Scott and Dunlap had relation to the deed executed after the judgment in the San Bernardino case to Mrs. Rains' children and the power of attorney to Carlisle, and not to the judgment. The findings in the Santa Clara case, if there were any, are not in the transcript, and the judgment therein makes no reference to any agreement between Scott and Dunlap. The point that this was averred to have been a collusive judgment is not well taken. The defendants acquired, before the commencement of the action, the title to an undivided one-half of the land patented to Portilla. This does not include the half conveyed to John Rains by Carillo and wife, by deed dated July 5, 1861. The above appears by stipulation. It was admitted on the trial that there is a league (the Moss league) of the land patented to Portilla which is not included in the patent to Warner. All the other land included in the patent to Portilla is included in the patent to Warner. As to the land included in the Warner patent, the defendants are entitled to recover it. This follows from what has been stated above.

The question as to that part of the land sued for outside of the patent to Warner, and embraced in the Portilla patent, demands further consideration. The Moss league, it is admitted by stipulation, is not included in the patent to Warner. Such is the meaning of the stipulation on page 362 of the transcript. We do not know that the defendants ever acquired more than the above half of the league. The other half passed to John Rains, and he died intestate as to it. This half was acquired during the coverture with his wife, Maria Merced, and was, therefore, community property, and on his death passed, subject to the payment of debts of the community, one-half to Maria M., his relict, and the other half to his descendants (children): See act of May 8, 1861 (Stats. 1861, p. 310). Rains left four children, one of whom, Isaac, died in 1877, intestate, unmarried, and without issue. His portion, an undivided one-fifth, descended to his mother, Maria Merced. The other four-fifths descended to the other

children. The title to one-fifth of this half, or one-twentieth, of the Moss league, was in Mrs. Foley when the action was brought, and she is entitled to recover it. Isaac's interest in this land passed by descent to Mrs. Rains or Carillo on his dying intestate in 1877, unmarried and without issue. The portions of Robert, John, and Victoria of this league remained in them when the action was commenced. The record does not show that they were ever conveyed to the plaintiffs, or either of them. Nor does it show that Mrs. Carillo ever conveyed her interest in this league to the plaintiff Foley or Gage. We have searched the record with the greatest care, and can find in it no deed to plaintiff Gage from anyone, and the only deed to the plaintiff Foley is that executed by her mother (Mrs. Rains) to her children on the 14th of March, 1863, which was set aside. As the record shows no conveyance of any kind to plaintiff Gage, it is free from error as to him. We have said nothing as to the interest which appears to have been acquired by Mrs. Rains or Carillo from Mrs. Carlisle by the deed of the latter. So far as it affects the land in the Warner patent, it inured, under the Howard deed, to the benefit of the defendants. As to any interest in the Portilla, it still remains in her, and can cut no figure in this suit, as she is not a party seeking any relief.

Conceding that the contracts between Glassell, Smith & Patton and the plaintiffs (which are found by the court) are void, they are of no material significance in this action. If they were void, they cannot and have no effect on the title of plaintiffs. The plaintiffs may set them up against Glassell, Smith & Patton, if they should so elect, when the former make any claim against them. We cannot see that defendant's rights are in any way enlarged by these contracts. If such contracts are void, they are no more than so much blank paper between the parties. They take away nothing from the plaintiffs, and add nothing to the rights of defendants. The contention of defendants on this point need not be further considered. It is dismissed from further notice as untenable.

As this action is brought to recover lands embraced in the Portilla and Warner patents, and as it clearly appears that the plaintiff, Mrs. Foley, is entitled to recover a portion of the lands embraced in the Portilla patent, viz., one-twentieth of the Moss league, and of any portion of the Portilla patent

not included in the Warner patent, as to her there must be a new trial. The order denying a new trial to plaintiff Gage is without error. The judgment and order are reversed as to plaintiff Foley, and the cause remanded for a new trial as to her. As to the plaintiff Gage, the judgment and order must be affirmed. So ordered.

We concur: Searls, C. J.; Paterson, J.; Sharpstein, J.; McKinstry, J.; McFarland, J.

BATES v. SCHROEDER.

No. 12,712; August 20, 1888.

19 Pac. 121.

Appeal—Failure to File Transcript—Dismissal.—A clerk of appellant's attorney, during the illness of his employer and against his directions, took the appeal, but failed to file a transcript. Appellant's attorney was first apprised that appeal had been taken by respondent's notice of motion to dismiss, when he served and filed a transcript. Held, that the appeal would not be dismissed.

APPEAL from Superior Court, San Mateo County; E. F. Head, Judge.

Motion to dismiss appeal, on the ground that no transcript was filed in time. The affidavit of appellant's attorney, heard upon the motion, alleged that appellant, defendant below, interposed a demurrer to the complaint, which was overruled, and judgment rendered for plaintiff; that within ten days after rendition of the judgment deponent was taken sick, and confined to his bed and room for about a month, being unable to attend to any business; that, while so confined, he was informed that defendant had requested one of deponent's clerks to take an appeal in the cause, but that he had directed the clerk not to take the appeal, and supposed his directions had been obeyed; that he was first apprised that appeal had been taken by respondent's notice of motion to dismiss; that, upon receiving such notice, he caused a transcript on appeal to

be made out, served, and filed in this court, and that it was his intention in good faith to prosecute the appeal; that the judgment appealed from is, in his opinion, manifestly erroneous.

D. M. Delmas for appellant; J. C. Bates for respondent.

PER CURIAM.—On an examination of the papers herein the court is of opinion that the appeal should not be dismissed, and the motion must be denied.

PENDERGRASS v. BURRIS.

No. 12,509; September 22, 1888.

19 Pac. 187.

Mortgages—Deed Absolute.—Plaintiff's Intestate Owed Defendant and others large amounts of money which he was unable to pay, and in consideration of the release of defendant's and payment of other debts conveyed a ranch to him, defendant surrendering intestate's notes, and taking possession of the land. Intestate remained on the land, boarding with the tenants, until his death, four years after; collected rents, sold crops, and cultivated a portion for one year himself. There was evidence that the intestate was agent and tenant of defendant, and did not claim ownership of the land. Defendant testified that the sale was absolute, but that shortly afterward he agreed, in writing, that if intestate could within a year find a purchaser, he would convey the land, taking the amount of the debts and interest, and allowing intestate to retain the residue. Admissions of defendant of facts from which a mortgage, instead of a sale, might be inferred, were explained. Some other circumstances were proved for and against the theory that the transaction was intended only as security for a debt. Held, that the finding of the trial court, that the intention of the parties was to make an absolute sale, should not be disturbed.

APPEAL from Superior Court, Tulare County; William W. Cross, Judge.

Ejectment by T. W. Pendergrass, administrator, of the estate of C. T. Thornton, deceased, against David Burris, to

recover the possession of certain lands in Tulare county. At the trial it was shown that plaintiff's intestate at one time owned the land, but conveyed it to defendant by deed absolute in form, but which plaintiff claimed to be in fact security for a debt. There was evidence that before the execution of the deed the grantor owed the grantee and others large amounts which he was unable to pay, and which drew more than the legal rate of interest, and conveyed the land in consideration of the release of defendant's debt and the payment by him of the other debts. When the deed was made intestate's notes were surrendered to him, and defendant took possession of the land, although intestate lived on it until his death, four years after, boarding with the tenants. Defendant testified that the transaction was an absolute sale, and that intestate owed him nothing after the deed was made. He also testified that all intestate had to do with the land after the sale was as his agent in renting it out, collecting rent, selling crops, etc., and that one year he cultivated a part of the land as defendant's tenant. Defendant further testified that, shortly after the deed was made, intestate, thinking the land could be sold for more money, requested defendant to allow him to sell the land and pay him back the amount of the debts, with interest, to which defendant consented, and signed a writing to that effect, giving intestate one year in which to find such purchaser, the agreement stating that time was of the essence of the contract. Defendant and intestate never had a settlement of their transactions after the sale during the time intestate was collecting the rents and selling the crops from the land. Some of the money derived from the rents intestate used, with defendant's consent, to pay some debts he still owed. There was evidence of conversations of intestate in which he acknowledged the land to be defendant's, and that he was only acting as his agent; and of conversations in which defendant admitted intestate's right to the land upon payment of the debts and interest. Defendant told creditors of intestate after his death that he was a creditor of intestate's to a large amount, and that if they did not allow him to be appointed administrator he would put his claim in, which would consume the estate, so that they would get very little, but if he was appointed he would pay them seventy-five cents on the dollar of their debts, to which they agreed, and he

paid them that amount. Afterward the present plaintiff was appointed administrator in defendant's place. Defendant explained this on the ground that intestate owed him a large sum of money collected from tenants, crops sold, etc., while acting as agent for defendant. Defendant paid all the taxes on the land after the deed was made. The finding and judgment of the court (without a jury) was for defendant, and plaintiff appealed.

Sidney V. Smith and M. S. Babcock (Stanly, Stony & Hays of counsel) for appellant; Brown & Daggett and Atwell & Bradley for respondent.

PER CURIAM.—This case turns upon the question whether or not a certain deed was intended to be a mortgage. The court below found that it was not a mortgage. The ingenious argument of counsel for the appellant has cast some doubt upon the correctness of this conclusion. Nevertheless, upon the evidence in the record, we do not feel warranted to declare that the court below erred in its decision. The judgment and order denying a new trial are affirmed.

CITY OF EUREKA v. CROGHAN.*

No. 11,695; October 27, 1888.

19 Pac. 485.

Dedication—Public Street—Acceptance.—The Conveyance of a Tract of Land within the corporate limits of a town, by deed describing the tract as bounded by the lines of certain designated streets, if projected, and as being the northwest quarter of a certain designated block, as laid down on the official map of said town, together with five years' use of the projected streets by the public, constitutes a complete dedication of such streets to public use, without a formal acceptance by the town.[1]

*For subsequent opinion in bank, see 81 Cal. 524, 22 Pac. 693.

1 **Cited,** in Riley v. Buchanan, 116 Ky. 633, 76 S. W. 529, 63 L. R. A. 642, as authority for "the general doctrine of an acceptance by the public being presumed from its long continued use of the highway."

APPEAL from Superior Court, Humboldt County.

Ejectment by the city of Eureka against Barney Croghan to recover a tract of land claimed by said city as a street. Judgment was rendered for plaintiff, and defendant appeals.

E. M. Wilson (Horace L. Smith of counsel) for appellant; S. M. Buck for respondent.

FOOTE, C.—This is an action of ejectment, brought by the city of Eureka to recover from the defendant a piece of land which it is claimed is a street of said city. The principal point made by the defendant for the reversal of the judgment and order refusing a new trial is that the findings are not supported by the evidence. It is claimed that the dedication was not attempted to be made, and, if attempted, was revoked, and after revocation was never formally accepted by the city. The case of Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141, cited by the appellant as being in favor of his contention here, is not in point. The facts in that case were materially different from those involved here. The language of the judge below, in reviewing the facts showing a dedication of the land in controversy here as a street, is so decisive that we quote and adopt it: "The question to be decided in this case is whether or not the land described in the complaint has been dedicated to public use as a street. (1) On April 7, 1870, John Cushing, who was then the owner of the land in controversy, together with other land, executed to one Leary a deed of land thus described: 'Commencing at a point distant, in a southerly direction, 600 feet from the N. W. corner of block 108, as laid down on the official map of the town of Eureka, made by J. S. Murray, and filed in the office of the county recorder of said county, July 28, 1859, said point of commencement being the N. W. corner of a block of land bounded on the north and west by Tenth and F streets, if said streets were projected; thence running south along the east line of F street, if said street were extended southerly, 120 feet; thence easterly at right angles with said F street, 120 feet; thence northerly, and parallel with F street, 120 feet; thence westerly, along the south side of Tenth street, 120 feet to the place of beginning—being the northwest quarter of the block,' etc.

What is the legal effect of this deed? Does it or did it operate as a dedication of the land adjacent on the north, as a street, under the well-known rule, more than once announced by the supreme court of this state, that, where a lot is sold as fronting on or bounded by a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant, and vests in the grantee, in common with the public, the right of way over such street? Breed v. Cunningham, 2 Cal. 369; People v. Blake, 60 Cal. 499. If the deed can be construed as conveying a parcel of land bounded on the north by a line which would be a continuation of Tenth street if such street were extended, then it could not be said that it described the land sold as fronting on or bounded by a street. But we must look at every part of the description, and not alone to the words 'if said streets were projected,' in order to grasp the true meaning and legal effect of this deed. In it we find other words of description having no doubtful signification. The point of commencement is stated to be the 'N. W. corner of a block of land bounded,' etc.—then giving the calls; thence to the place of beginning. The land conveyed is further described as the 'northwest quarter of the block.' These words, taken in connection with the other words of the deed, are controlling, and fix its meaning definitely. This was a sale of land within the corporate limits of a town, now city. When we speak of a block of land in a town or city, reference is always made to a square or parcel of land inclosed by streets, whether occupied by buildings or composed of vacant lots. The words, as applied to land in a town, has no other meaning. Calling this land the northeast quarter of a block necessarily carried with it the assertion that it was the northwest quarter of a tract of land surrounded by spaces known as 'streets.' I think the deed must be construed as bounding the land therein described on the north side by a street or space of the same width, and what would be a continuation of Tenth street, if the municipal authorities should extend or open the same; and, so far as the grantor was concerned, operated as a dedication of the land to the public, he being at the time the owner of such space." It also appears in evidence that, for more than five years prior to the obstruction of this street by the defendant, it had been uninclosed, and had been used as a street by the public for all the purposes

for which they had occasion to do so. To make the dedication complete, no formal acceptance by the city of Eureka as a corporation was necessary: San Leandro v. Le Breton, 72 Cal. 175, 13 Pac. 405, and cases cited. We are of opinion that no prejudicial error is shown by the record, and advise that the judgment and order be affirmed.

I concur: Belcher, C. C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

SESLER v. MONTGOMERY.*

No. 11,359; December 3, 1888.

19 Pac. 686.

Slander—Communication by Husband to Wife—Publication.—Communication by a husband to his wife of slanderous words in regard to a woman is a publication.

Slander—Evidence.—In an Action for Slander, Where It is Shown That Defendant accused plaintiff of perjury and want of chastity, in a room where his wife was, in a voice loud enough to be heard outside, there is sufficient evidence that she heard and understood the words.

Slander—Privileged Communication—Husband and Wife.—Under Civil Code of California, section 47, providing that a privileged communication is one made without malice to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, and section 48, providing that malice is not to be inferred from the mere fact of publication, a finding of the jury that a communication from a husband to his wife, with whom he was on bad terms, slanderous of a female acquaintance of hers, who had testified for her in divorce proceedings between her and her husband, was made with malice, and was not privileged, cannot be disturbed.

Trial—Argument of Counsel—Failure to Introduce Evidence.—Under Code of Civil Procedure of California, section 2061, subdivision 6, providing that evidence is to be estimated, not only by its

*For subsequent opinion in bank, see 78 Cal. 486, 21 Pac. 185.

own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, comment to the jury upon the failure of defendant to introduce his wife to corroborate his own testimony is proper.[1]

APPEAL from Superior Court, Alameda County.

Action by Mary A. Sesler against A. Montgomery for slander. Judgment for plaintiff, and defendant appeals.

Estee, Wilson & McCutchen, J. C. Martin and W. F. Goad for appellant; W. W. Allen, A. R. Cotton and W. H. H. Hart for respondent.

HAYNE, C.—Action for slander. Verdict and judgment for plaintiff. Defendant appeals. Several points are made.

1. It is said that there was no publication. The facts are that the words were spoken to the defendant's wife, and were overheard by the plaintiff, who was listening in the corridor. The point is that husband and wife are in law one person, and that therefore a communication between them is not "published," within the meaning of the law of slander. It is to be observed that this is a different thing from saying that the communication was privileged. There must be a publication before the question of privilege can arise. We have not been referred by appellant to any decision in support of the precise point, except Trumbull v. Gibbons, 3 City H. Rec. 97, decided by an inferior court. We have not had access to this report, but from the mention of the case in Townshend on Slander we should infer that the decision proceeded on another ground, and that what is said in relation to the question in hand is merely a dictum. Nor have we been able to find any case exactly in point. Upon principle we should say that there was a publication. That husband and wife are one person is a mere fiction, and is not true for all purposes. The tendency of modern law, especially in California, is certainly not to extend the operation of the fiction. Nor do we see any reason why it should be extended, at least in the present direc-

[1] **Cited** and approved in Chicago etc. Ry. Co. v. Krayenbuhl, 70 Neb. 771, 98 N. W. 46, a suit for damages for injuries to a child caused by negligently leaving a turntable unlocked. The plaintiff's counsel commented upon the nonproduction, as a witness, by the defense, of the person whose duty it was to keep the turntable locked.

tion. The reputation of a woman can certainly be injured by slanderous communications to her female friends; and the fact that the communication came through a husband would not ordinarily deprive it of its injurious effect. Furthermore, if husband and wife are one person to the extent that a communication from the husband to the wife concerning a third person is not published, it would seem to follow that a communication from a third person to one of the spouses concerning the other would not be a communication concerning a third person, so as to constitute a slander. But the contrary has been decided. A communication to one of the spouses concerning the other may be slander: Wenman v. Ash, 13 Com. B. 836; Schenck v. Schenck, 20 N. J. L. 208; Odgers, Sland. & Lib. *152, *153. That the result is the same in each case is stated by Townshend, who says: "The husband or wife of the author or publisher, or the husband or wife of him, of whose affairs the slander concerns, is regarded as a third person": Townsh. Sland. & Lib. sec. 95. We think, therefore, that a communication from a husband to his wife may constitute a publication.

2. It is contended that there was no evidence that the wife heard or understood the words uttered. The words imputed to the plaintiff perjury and a want of chastity, and hence were slanderous per se. They were not ambiguous, and were spoken of the plaintiff, and could not have referred to any other person. This being the case, the only possible point that can be made in this regard is that there is no proof that the wife heard or understood the words at all. It is certainly true that the slanderous words must be heard and understood. And it may be conceded that the burden is on the plaintiff to prove the hearing and understanding. But where a man converses with his wife in a room in such a tone of voice that he can be heard and understood by a person outside of the room, it is hardly possible that the wife did not hear and understand him. If the wife was deaf, or did not understand the language, or any other peculiar circumstance existed to prevent what would be the ordinary result, we think the defendant should have proved it. What was proved was sufficient to overcome the burden we have assumed to be on the plaintiff in the first instance.

3. It is urged that the communication was privileged. The code provides that a privileged communication is one made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information": Civ. Code, sec. 47. It is clear from the above that if there be malice the communication cannot be privileged, and the question of the existence of malice is one for the jury. In this case the jury was instructed that if no malice was shown the communication was privileged. It must be assumed from their verdict, therefore, that they believed that there was malice; and, although malice is not to be inferred from the mere fact of the publication (Id., sec. 48), we cannot say from the record that the jury was not justified in finding the existence of malice. The circumstances were such as to negative the theory that the communication was for justifiable purposes. At the time it was made, the defendant was on bad terms with his wife. A suit for the annulment of the marriage was then pending. The plaintiff was an acquaintance of the wife, and had come, at the wife's request, to give the protection of her presence against any outbreak on the part of the husband. She had testified on behalf of the wife in the suit above mentioned. The charge of perjury was probably made by the husband with reference to this testimony, and the inference is strong that it was resentment on his part at her testifying on the part of the wife, and not solicitude for the welfare of his family, that caused him to utter the slander. This inference is not weakened by the circumstance that the interview between the defendant and his wife was a stormy one; that he "became so excited" that he called his wife a liar; that the communication with reference to plaintiff was coarse and brutal in its nature; and that "he spoke in an angry tone." Taking everything together, we think there was evidence from which the jury could infer malice. Hence the communication was not privileged.

4. It is claimed that there was an irregularity of counsel for the plaintiff in the argument to the jury. During the trial the plaintiff called the defendant's wife to the stand, and after

she had been sworn, and testified that she was his wife, the defendant's counsel objected to any further testimony from her, on the ground that the consent of the defendant to her being a witness had not been obtained. There was no ruling upon the point. The plaintiff withdrew the witness, and she was not subsequently recalled by either party. This left a direct conflict between the plaintiff and the defendant as to whether the slanderous words were uttered. The plaintiff affirmed the fact, and the defendant positively denied it. During the argument the plaintiff's counsel began by referring to the objection which had been made to the wife's testifying, and was proceeding to argue from it that an inference against the truth of the testimony of the defendant should be drawn. The counsel for the defendant objected to this line of argument; but the court overruled the objection, and the counsel for the plaintiff proceeded with his argument, dwelling mainly upon the failure of the defendant to call his wife as a witness. We think the action of the court was proper. Where it is in the power of a party to call a witness who can corroborate or disprove his statements, his failure to call such witness is a legitimate subject of comment to the jury. Such a case falls within the scope of subdivision 6 of section 2061 of the Code of Civil Procedure, which provides that "evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other side to contradict": See, also, Gray v. Burk, 19 Tex. 233. The nonproduction of evidence in such case is a circumstance from which the jury may draw an inference of fact. If this is so, it is permissible to counsel to ask them to draw such inference; and it is a matter of every-day occurrence for counsel to make such arguments. The case is not similar to that of a person accused of crime; for the statute expressly provides, with reference to cases where the prisoner does not testify, that "his neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or other proceeding": Pen. Code, sec. 1323. Now, in the present case, the wife was perfectly competent to be a witness if the defendant had consented. The slanderous words having been alleged to have been spoken to her, she could have corroborated or disproved his statements; and the circumstances excluded any idea that the communica-

tion was in fact confidential. He exercised much ingenuity to avoid admitting that she was his wife. His failure to consent was the sole reason she could not testify; and under the circumstances we think that the case falls within the rule above stated, and that the failure to give his consent was a subject of comment to the jury. It is to be observed that there was no ruling of the court upon the admissibility of the testimony, the witness having been withdrawn before a ruling was made; and there was no attempt to argue against the justice of the law, or to induce the jury to disregard the law, and it is therefore unnecessary to express an opinion as to what would have been the result had such circumstance existed. Moreover, we are not to be understood as saying that in every case in which a party fails to produce a witness such failure may be commented on to the jury. The fact sought to be inferred may not be an issue in the case (Fletcher v. State, 49 Ind. 134, 19 Am. Rep. 673), or may not be proper for the consideration of the jury: Rudolph v. Landwerlen, 92 Ind. 34. The whole subject of the latitude to be allowed counsel in argument rests very much in the discretion of the trial court, and an exercise of such discretion should be disturbed except in a clear case. The other points do not require special notice. We do not see any contradiction in the instructions. The charge of the court seems to have correctly presented the case to the jury. We think that the defendant had a fair trial, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., Concurring.—I concur in the judgment; but I am not prepared to say that there would have been a publication, if, at the time the slanderous words were spoken by defendant to his wife, he had been living with her in the friendly and confidential relation which usually exists between husband and wife.

FRANKISH v. SMITH.

No. 12,611; December 4, 1888.

19 Pac. 701.

Quieting Title—Evidence.—Where the Decisive Question in an action to quiet title is whether a note given for the purchase of the land was intended as an absolute payment, or as an evidence of debt, and the evidence is conflicting, a finding that it was merely evidence of debt will not be disturbed.

APPEAL from Superior Court, San Bernardino County; James E. Gibson, Judge.

Action by Charles Frankish against J. H. Smith to quiet title to a piece of land which plaintiff had contracted to sell to defendant. Plaintiff obtained judgment. Defendant appeals.

Rowell & Rowell for appellant; W. Taylour English for respondent.

FOOTE, C.—Action to quiet title. The principal point of contention in this case is as to whether a note for $500, given by Smith on the purchase of a piece of land from Frankish, was intended as an absolute payment, or as an evidence of debt. The defendant contends that the evidence shows it was accepted as an absolute payment of so much of the purchase price for the land, and that the remedy of the plaintiff was thenceforward by suit on the note, distinct from any claim on the land. The court below found that the note was not accepted as payment; that it was not paid when due; and that thereupon the plaintiff, as he had a right to do under a written contract of sale of the land contemporaneous with and a part of the same transaction as the giving of the note for $500, rescinded the contract of sale; and that the tender of payment of the note last mentioned, and another note for a deferred payment, given at the time when the agreement to sell was made, came too late. There was a sharp con-

flict in the evidence upon the points involved, and we advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

HARRIS et ux. v. SUTHERLAND (BOX, Intervener).

No. 12,655; December 4, 1888.

19 Pac. 701.

Mortgage—Deed Absolute—Weight of Evidence.—A decree deciding that a deed absolute on its face is not a mortgage will not be disturbed, on appeal, where the evidence is conflicting.

APPEAL from Superior Court, Fresno County; J. B. Campbell, Judge.

Action by C. C. Harris and Pattie A. Harris, his wife, against William Sutherland, to redeem land from an absolute conveyance made by plaintiffs to defendant, which plaintiffs allege to be a mortgage. A. J. Box intervened, claiming the land as an innocent purchaser from Sutherland. The court held the instrument to be a deed, and not a mortgage. Plaintiffs appeal.

Hinds & Merriam for appellants; E. D. Edwards for defendant and respondent; C. G. Sayle for intervener and respondent.

FOOTE, C.—This case turns upon the point as to whether or not the evidence is sufficient to warrant the court below in finding that a certain instrument in writing made by the plaintiff to Sutherland, the defendant, was intended to be a deed, and not a mortgage. The evidence is conflicting, and the finding should be upheld. We advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

McCORMICK v. SHERIDAN.

No. 11,339; December 11, 1888.

20 Pac. 24.

Contempt—In Petition for Rehearing—Disavowal.—A petition for rehearing stated that "how or why the honorable commissioner should have so effectually and substantially ignored and disregarded the uncontradicted testimony . . . . we do not know. . . . . It seems that neither the transcript nor our briefs could have fallen under" the commissioner's observation. "There is not a scintilla of evidence to the contrary, and yet the honorable commissioner assumes," etc., and "in very euphuistic language says," etc. "A more disingenuous and misleading statement of the evidence could not well be made." "It is substantially . . . . untrue, and unwarranted." "The decision . . . . seems to us to be a travesty of the evidence." Held, that counsel drafting the petition was guilty of contempt committed in the face of the court, notwithstanding a disavowal of disrespectful intention.[1]

On proceedings against Frederick H. Waterman for contempt.

PATERSON, J.—On October 23, 1888, the judgment of the court below was affirmed herein, upon an opinion written by

[1] **Cited** and approved in In re Chartz, 29 Nev. 120, 124 Am. St. Rep. 923, 85 Pac. 356, 5 L. R. A., N. S., 916, and its principle extended to a case where, in the petition for rehearing, the person and motives impugned are those not so much of the judge as of the makers of the law he has decided to be constitutional.

Cited and approved in Lamberson v. Superior Court, 151 Cal. 464, 91 Pac. 102, 11 L. R. A., N. S., 619, where it is said that subdivision 4 of section 170 of the Code of Civil Procedure, while it allows the affiant, in an application for a change of judges, to state the fact if, as a fact, the judge has indulged in corrupt practices or ruled or decided through a corrupt motive, does not allow him to make such statements without supporting facts.

Cited and followed in Lamberson v. Superior Court, 151 Cal. 459, 91 Pac. 100, 11 L. R. A., N. S., 619, where the attorney had presented a scandalous affidavit to the judge in support of an application for a change of judges.

Cited and approved in Lamberson v. Superior Court, 151 Cal. 460, 91 Pac. 101, 11 L. R. A., N. S., 619, as being in accord with the views of the United States supreme court in Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. Rep. 77, there quoted, as regards procedure.

Commissioner Belcher, concurred in by Commissioners Foote and Hayne, and adopted by this court: McCormick v. Sheridan, 77 Cal. 253, 19 Pac. 419. On November 23d a petition for a rehearing, signed, "Shafter, Parker & Waterman, Attorneys" for appellant, was filed herein. Upon reading the said petition we were surprised to find statements therein which were intended apparently to reflect on the good faith and diligence of the commissioner who had written the opinion. Among other things, the author of the petition said: "The decision of the honorable commissioner, affirmed by this court, is wholly contrary to law and the evidence shown in the record here. How or why the honorable commissioner should have so effectually and substantially ignored and disregarded the uncontradicted testimony of unimpeached witnesses given at the trial, and shown in the transcript, we do not know, nor can we conjecture; that he has done so is evident. . . . . From the opinion upon which the decision is based, it seems to us that neither the transcript nor our briefs could have ever fallen under the observation or examination of the honorable commissioner. . . . . All of which, from the honorable commissioner's view of the law and the facts, must have been abandoned by McCormick, and were a fair prize to the first-comer. Yet Sheridan, more conscientious, perhaps, evidently had some doubts. . . . . There is not a scintilla of testimony to the contrary, and yet the honorable commissioner assumes that McCormick's residence and dwelling was on section 18. For what reason? we ask. . . . . The honorable commissioner, in very euphuistic language, says that 'on the 5th of December, some time after sundown, defendant entered upon the disputed quarter section.' . . . . A more disingenuous and misleading statement of the evidence, it seems to us, could not well be made than this. It is substantially, and for all the purposes of this investigation, untrue, and utterly unwarranted by the facts shown in the testimony. . . . . We forbear further comment upon what seems to us to be a remarkable perversion of law applied to conceded facts of record. We ask of this honorable court a fair examination of the record testimony. . . . . With all due respect to the honorable commissioner, and to this honorable court, the decision herein,

as evidenced by the opinion of the honorable commissioner, seems to us to be a travesty of the evidence and the uncontradicted testimony. . . . . Half-truths are often as misleading as whole untruths."

On November 26, 1888, an order was made herein, directing James McM. Shafter, Charles H. Parker and Frederick H. Waterman, members of the firm of Shafter, Parker & Waterman, attorneys and counselors at law, to appear before this court at its courtroom in the city of San Francisco, on the tenth day of December, 1888, at 10 A. M., then and there to show cause why they, and each of them, should not be punished for contempt. In obedience to the order said attorneys appeared before the court, and, it satisfactorily appearing from the statements of Messrs. Shafter and Parker that they were in nowise to blame for the language used in the petition—in fact, had nothing to do with its preparation—the order, as to them, was discharged: 20 Pac. 26, post, p. 39. The respondent Waterman filed a written statement and made a verbal explanation, in which he disavowed emphatically any intention to cast reproach or reflection on any of the commissioners, or on any member of this court, or to show disrespect or incivility in any sense whatever. His sole object, he said, was to put the matter before the court in as forcible a manner as possible, without disrespect, so that the individual members of the court would be induced to make a searching examination of the record. He admitted, however, that, upon reflection, the language was improper, and liable to the construction which the court evidently placed upon it.

These disclaimers by the respondent we accept as true, so far as it is possible to do so without giving a constrained construction to the language used by him in his petition for a rehearing. It may be that he acted in good faith, and without any design, wish, or expectation of committing any contempt, and we accept his explanation in palliation of the offense; but the language we have quoted from his petition for a rehearing is too plain and direct in its imputation of negligence and bad faith to authorize us in taking the disavowal of the defendant as sufficient to purge him of con-

tempt. As was said in In re Woolley, 11 Bush (Ky.), 109: "We recognize to the utmost reasonable limit of its application the rule that a supposed contempt, consisting in mere words, which are, apparently, intended to be scandalous and offensive, but which are at all susceptible of a different construction, may be explained or construed by the speaker or writer, and that, upon his sworn disavowal of intention to commit a contempt, proceedings against him must at once be discontinued. But this rule does not control where the matter explained or written is of itself necessarily offensive and insulting. In such a case the disavowal of an intention to commit a contempt may tend to excuse, but it cannot and will not justify, the act: People v. Freer, 1 Caines (N. Y.), 485. An intention to be offensive may be disavowed, and the particular language used to make the charges or imputations may be withdrawn, but the effect of the paper or publication, the ideas conveyed, the charges and imputations made, may remain." The effect of the respondent's disclaimer is weakened very much by the statement of the respondent Parker, in which he says that, when the respondent Waterman came to him with a draft of the proposed petition for rehearing, he, Parker, called his attention to the objectionable matters contained therein, and advised him to omit them therefrom. "The petition for a rehearing is not a pleading, but an argument addressed to the court, and to the individual members of the court. . . . . The petition was the counsel's argument in support of the motion for a rehearing, and the counsel, and not the client, is responsible to the court for the character of the argument, and for the insinuations, imputations, and charges which the petition may contain. The contempt committed in this way is a contempt in the face of the court": In re Woolley, supra.

Upon the facts contained in the petition for rehearing, and quoted above, we adjudge the respondent Waterman guilty of contempt, committed in the face of the court; and, as a punishment therefor, it is ordered and adjudged that said Waterman pay a fine of $200. It is further ordered that said $200 be paid to the clerk of this court on or before the twentieth day of December, 1888, and that, in default of such payment, he, Frederick H. Waterman, respondent, be im-

prisoned in the county jail of the city and county of San Francisco one day for every $20 of said fine remaining unpaid.

We concur: Searls, C. J.; McFarland, J.; Thornton, J.

I dissent: Sharpstein, J.

McCORMICK v. SHERIDAN.

No. 11,339; December 10, 1888.

20 Pac. 26.

On proceedings against C. H. Parker for contempt.

For opinion in the matter of the contempt of Waterman, see ante, p. 35.

PER CURIAM.—It appearing to this court, from the statements of the respondents in open court, that C. H. Parker had nothing to do with the preparation of the petition for a rehearing herein, and that he is in nowise to blame for anything contained therein, it is ordered that the order heretofore made herein, citing respondent to show cause why he should not be punished for contempt is, as to said C. H. Parker, discharged.

McCORMICK v. SHERIDAN.

No. 11,339; December 20, 1888.

20 Pac. 26.

In the matter of the contempt of F. H. Waterman.

For opinion on adjudication of contempt, see ante, p. 35.

PER CURIAM.—In the matter of the contempt of F. H. Waterman, committed in the above-entitled cause, said Water-

man having filed a written statement acknowledging the propriety and justice of the judgment of this court in imposing a fine of $200, with the alternative of imprisonment in default of payment of such fine, and it appearing from such statement and from the representations of the intimate friends of said Waterman that he is unable to pay such fine, and that his physical condition is such that imprisonment may endanger his health, and the said F. H. Waterman having paid the cost herein, to wit, $10, it is now, therefore, ordered that the fine of $200 imposed upon said Waterman be, and the same is hereby, remitted.

PEOPLE v. REED.*

No. 11,769; December 18, 1888.

20 Pac. 708.

Dedication—Acceptance—Revocation.—In 1862 the owner of a tract of land caused the same to be surveyed and platted. Part of one of the streets marked on the plat was never opened or used as a public street, and for a period of more than twenty years the owner had a barn and shed on said part, inclosed by a substantial fence. There was no acceptance of said street until the passage of a city ordinance, in 1884, directing the street commissioners to demand the possession of the part of the street so occupied. Held, that there was no sufficient dedication or acceptance, and that, if there had been a dedication, it was revoked before acceptance.

APPEAL from Superior Court, Santa Clara County; D. Belden, Judge.

Action by the people against Reed to compel the defendant to remove obstructions from an alleged public street in the city of San Jose. Judgment for plaintiff. Defendant appeals.

William Matthews for appellant; Attorney General George A. Johnson and D. W. Harrington for respondent.

*For subsequent opinion in bank, see 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474.

SHARPSTEIN, J.—This action is brought to compel the defendants to remove obstructions from an alleged public street in the city of San Jose. The plaintiff alleges and the defendant denies that the land upon which the obstructions are maintained is a part of a public street. Upon that issue the court below found in favor of the plaintiff and against the defendant, and rendered judgment accordingly. From the judgment this appeal is taken. The contention of appellant is that the findings do not justify the judgment. Whether the facts found justify the conclusion that the land in controversy was dedicated and accepted as a public street is the question to be determined on this appeal. The facts found are substantially as follows:

In 1862 appellant was the owner of a certain tract of land in San Jose, and in that year caused the same to be surveyed into streets and blocks, and said blocks to be divided into lots, the streets being designated by names, and the blocks and lots by numbers, on a plat or map prepared by the surveyor. Between the years 1862 and 1877 appellant sold and conveyed to divers persons lands within the tract so surveyed and platted as aforesaid. One of the streets designated on said plat or map was Divine street, running from First street to Terraine street, through North Market and San Pedro streets. But said Divine street, or so much thereof as lies between said North Market and San Pedro streets, has never been used or opened as a public street; and for a period of more than twenty years before the commencement of this action there was a barn and shed thereon, inclosed by a substantial fence, which effectually and completely prevented any use thereof as a public street. There was no formal or other acceptance of said alleged street prior to the passage of an ordinance on the twelfth day of December, 1884, directing the street commissioner of said city to demand the possession of the strip of land claimed to have been dedicated as aforesaid, and to remove all obstructions therefrom, and to throw the same open for public use.

Are the facts found sufficient to constitute a dedication of the land in controversy to a public use? We think not. In the leading case in the United States on this subject, the court says: "There is no particular form necessary in the dedica-

tion of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation": City of Cincinnati v. Lessee of White, 6 Pet. (U. S.) 431, 8 L. Ed. 452. In the case at bar, as before stated, the land never has been used for a public purpose. The supreme court of West Virginia says: "If there has been no use by the public, we may safely adopt the language of the court of appeals of New York, strong as it is, as laying down correctly the law in such case," i. e.: "The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use": Pierpoint v. Harrisville, 9 W. Va. 215; Holdane v. Trustees, 21 N. Y. 477. In the case at bar the only acts of defendant which tend to show an intention to dedicate the land in controversy are the survey and map on which a street is delineated. The intention not to dedicate is more strongly manifested by keeping the premises inclosed, and maintaining on them substantial buildings. There is a very strong resmblance between this case and the cases of Tate v. Sacramento, 50 Cal. 242, and Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141, in both of which it was held that the facts were insufficient to constitute a dedication. But, conceding that the defendant in 1862 evinced an intention to dedicate the strip of land in controversy as a public street, it is not claimed that there was an acceptance of it until after the lapse of more than twenty years, during all of which time it was in his power to revoke the dedication. The only act claimed to constitute an acceptance is the passage of the ordinance for the opening of the street, which appears to us more like an attempt to take private property for public use without compensation than it does like an acceptance of a street.

We think the facts found insufficient to constitute a dedication or acceptance, and that if there had been a dedication it was revoked before there was any acceptance of it.

Judgment reversed, with directions to the court below to enter judgment for defendant upon the findings.

We concur: Searls, C. J.; McFarland, J.; Paterson, J.

MAGEE v. NORTH PACIFIC COAST R. CO.*

No. 11,730; December 24, 1888.

20 Pac. 709.

Employer's Liability—Assumption of Risk.—In an Action by a Brakeman against a railroad company for injuries received in a collision with an ox which was on the track through defendant's negligence in not keeping up proper fences, it appeared that it was apparent to anyone who looked at them that the fences were insufficient to turn stock; and it was known that cattle had frequently broken through them while plaintiff was in defendant's employment, when the train would be stopped, and the cattle driven off the track; and at least once plaintiff had assisted in driving them off. Plaintiff, a man of intelligence, had, as brakeman, ridden over the road along which the fences ran for some months. The court charged that if plaintiff knew the condition of the fences, or, as a prudent, reasonable man, should have known it, the verdict should be for defendant. Held, that a verdict for plaintiff could not be sustained, though he testified that he did not know the condition of the fences.

APPEAL from Superior Court, Marin County; J. F. Sullivan, Acting Judge.

Action for personal injuries by William F. Magee against the North Pacific Coast Railroad Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals.

W. H. L. Barnes for appellant; Hepburn Wilkins for respondent.

FOOTE, C.—This action was brought to recover damages from the defendant for the alleged injuries suffered by the plaintiff in being thrown from a train of cars operated upon the defendant's railroad track. The plaintiff recovered a judgment for $2,500; from which, and an order refusing a new trial, the defendant appeals.

The complaint alleged that it was the duty of the defendant toward the plaintiff, one of its employees, viz., a brakeman

*For subsequent opinion in bank, see 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114.

and assistant baggage-master, to keep the right of way and track of its railroad "fenced with good and sufficient fence on both sides thereof, so as to prevent cattle and animals from getting on said track," and "to provide a good, safe and secure locomotive and tender, with a pilot cowcatcher in front thereof, and to run and operate its trains in such manner as to always have the locomotive in front of its train, and a pilot or cowcatcher in front of said locomotive engine, and in a position to remove obstructions from said track." It was then alleged that these general duties were unperformed, and that of their nonfulfillment the defendant had notice.

The charge was also made against the defendant that by reason of its negligence its railroad track and right of way were not at the time of the plaintiff's injury fenced with good and sufficient fences, by reason of which neglect a bull or ox got upon said track; and by reason of that, and the negligence of the defendant in running its locomotive engine with the tender in front, and without a cowcatcher, etc., the locomotive engine ran against the bull or ox, which collision resulted in the plaintiff (while using due care and attention in the line of his duty) being thrown off the car where he was properly stationed, and seriously and painfully injured.

There seems to be no doubt but what the facts show that the plaintiff suffered the injuries complained of through a collision of the train with the ox or bull, which had gotten upon the track through the negligence of the defendant in not keeping up proper fences. It is equally clear that the plaintiff was fully aware of the fact that the defendant's locomotive engine was run with the tender in front, and had been so run for a long time, and it is apparently conceded on both sides that under the evidence no cause of action existed in favor of the plaintiff on that ground. But it is insisted by the plaintiff, and denied by the defendant, that the negligence which caused the accident in which the plaintiff had his leg broken was by reason of the fact that the fences along the track were insufficient to turn cattle and stock, and that on account of the bad condition of the fences, well known to the defendant and unknown to the plaintiff, the bull or ox got on the track, caused a car or cars to be precipitated therefrom, the plaintiff violently thrown off and permanently injured.

The evidence unquestionably and without serious conflict shows that the fences were neither good nor sufficient; in fact, it appears from the evidence of all the witnesses who testified as to the matter that the fences were very bad; and this fact must have been apparent to even the most casual observer. They were composed of posts loosely set in the ground. There were but two planks, six inches wide and sixteen feet long, nailed parallel to each other from post to post. They were impaired by frequent nailing in some places, and could with difficulty be kept on the posts by nails. They were known to have repeatedly fallen off, or been pushed off by cattle which came out on the track. On various occasions during the time when plaintiff was in the defendant's employment the train would have to be stopped, and the intruding cattle driven off by the train hands, and upon at least one occasion the plaintiff had assisted in driving such intruding cattle off the track.

The plaintiff had been in the employment of the defendant for about a year and a half, and had been engaged for some months of this time in traveling upon its trains over the track and right of way, along which these insufficient fences ran. He declares in his evidence that he did not know of any defect in the fences, and that, so far as his observation went, they appeared to be good fences.

If it be conceded that the plaintiff paid so little attention to the fences as to suppose that they were good, it then appears that he acted in that respect in a manner entirely different from several other persons, who testify to facts from their observation which show that the fences would appear to any prudent man as being in a condition utterly inadequate to the turning of stock. The fences undoubtedly appeared to everyone who looked at, and who has testified as to, them, in the case, as bad and insufficient fences.

The evidence shows plaintiff to be a man of intelligence and acuteness; so that if he did not come to the conclusion, after abundant opportunity, that the fences were bad, it must have been because he did not notice them at all, when he should have done so. If he had been a reasonably prudent man, he would have known that the fences were bad; and that cattle, which were abundant thereabout, and had gotten on the railroad track, causing the train to stop until they could be

driven off, would do so again, and that a collision might take place, and he be seriously hurt.

Such being the state of the evidence, what was the duty of the jury in the premises, under the instructions of the court, unobjected to by the plaintiff, one of which was as follows: "If, on the contrary, you find that the plaintiff fully knew the unsafe condition of the fences at the place of injury, or, as a prudent, reasonable man, should have known their condition, then your verdict should be for the defendant."

It would seem that it was their duty to say that, as a prudent, reasonable man, the plaintiff should have known the condition of the fences at the place of injury, as many other witnesses who testified in the case stated facts about the fences which uniformly showed their condition to have been bad, and the plaintiff himself does not in any way whatever contradict their statements in that respect.

There is no conflict in the testimony as to the fences being bad—a fact which must have impressed itself upon any prudent man, viewing them as he rode past them day after day for months, if he had chosen to avail himself of an abundant opportunity presented to him of looking at them, and being compelled by such observation to note their wretched condition. The only conflict is between the statement of the defendant that he did not know they were bad and insufficient fences, and that of everybody else who looked at and stated them to be insufficient.

The plaintiff nowhere even intimates that the fences were not glaringly insufficient; in fact, he succeeded by the testimony of his own witnesses in demonstrating the truth of that matter. Yet he utterly fails in his evidence to explain how he alone, of all those who gave the fences any attention, did not observe their insufficiency. How, then, could he fail to know that the fences were bad, and appreciate the risk which he ran, unless he neglected, as a prudent man, to observe the condition of the fences, which were daily within his view? He does not say that he gave them any attention; he does not declare that those who did view them were wrong in their conclusion; he does not give any reason why he did not know their condition, which was patent to any observer; he contents himself with saying he did not know their bad condition, as they appeared to him to be good.

It is impossible, in view of the uncontradicted evidence in the record, that the plaintiff could have remained in ignorance of the insufficiency of the fences, unless he had willfully refrained from looking at them, or had utterly neglected to do so. In either event he did not act either as a prudent or reasonable man in his situation should have done.

In the case of Sweeney v. Railroad Co., 57 Cal. 15, the engineer, who was killed by the train colliding with cattle, was shown to have known that he ran a great risk because of the entire absence of all fences along the track, and the appellate court held that a recovery could not be had against the railroad company whose train he was operating at the time he met his death.

The jury in the case in hand either disregarded the instruction of the court, or found contrary to the evidence. We, therefore, advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

TROPE v. KERNS.*

No. 11,186; December 24, 1888.

20 Pac. 82.

Ejectment—When Action Lies—Cumulative Remedy.—Plaintiff who has obtained a valid title to land by foreclosure, and is in possession of a portion of it, can bring ejectment for the balance, and is not compelled to rely on a writ of assistance.

Mortgage.—A Decree in Foreclosure cannot be Attacked in Ejectment brought to recover the land sold under the decree.

A Mortgagor is Estopped by the Terms of His Deed to Deny That His Estate was Other than an estate in fee, and the terms of

*For subsequent opinion in bank, see 83 Cal. 553, 23 Pac. 691.

a mortgage, importing a conveyance of the fee, are equivalent to a general warranty running with the land.

Trial.—Where One Special Finding is Conclusive of the Whole Case, Findings on Other issues are unnecessary.

APPEAL from Superior Court, Monterey County.

R. M. F. Soto and Hermann & Soto for appellant; S. F. Geil and H. V. Morehouse for respondent.

PER CURIAM.—This action is in ejectment for a parcel of land lying in the city of Salinas, Monterey county. The defendant filed a plea in abatement, and an answer traversing all the allegations of the complaint. The plaintiff filed a special demurrer to that plea, which was sustained. The defendant filed a cross-complaint, to which an answer was filed. The cause was tried upon its merits, and the court gave judgment for the plaintiff, from which this appeal is prosecuted. There are no questions arising in the case to be reviewed, except those relating to the pleadings, and whether the findings are sufficient and support the judgment.

The defendant seems to contend that because his plea in abatement shows that the plaintiff was in possession of nearly all the lot sued for by a valid title under a foreclosure suit and sale and sheriff's deed, that nevertheless he ought not to recover, because he was not in possession of a part of the lot, and did not claim it, for the reason that he did not get out a writ of assistance, and gain possession under the foreclosure sale, but sought in this action to get possession by an action of ejectment. We perceive no merit in this view of the law. The remedy by writ of assistance is merely cumulative, and does not, if a failure to use it occurs, preclude the plaintiff from bringing an action of ejectment. The demurrer was properly sustained.

The defendant contends that the judgment should be reversed, because it is shown by the findings, as he alleges, that in the action of foreclosure, before the judgment was made and entered, a stipulation was entered into by his attorney, himself and the plaintiff's attorney, by which the decree of foreclosure was not to include a portion of the land in controversy, which stipulation, by inadvertence, was not carried out, but the judgment rendered as to the whole of the land.

But this is in the nature of a collateral attack upon the judgment of the district court having jurisdiction of the subject matter and of the parties, in rendering the judgment, to include more land than the parties intended by stipulation should be included. This, we think, cannot be done.

It is further urged that the plaintiff should not have recovered his judgment, because the findings show that the defendant had, before the execution of the mortgage to the plaintiff, deeded a part of the land under certain covenants and agreements to one Iverson, and that when Iverson, under those covenants, removed his tank, the defendant's former title reverted to him, and was good as against his mortgage to the plaintiff, the judgment of foreclosure, the sheriff's sale and deed thereunder. But this appellant is estopped from claiming, as we think. "The rule that a sheriff's deed delivered upon execution sale imports no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution, has no practical application to a sheriff's deed delivered upon foreclosure of a mortgage in fee; for, as we have seen already, the defendant in the latter case must continue to be estopped, by the terms of the mortgage deed itself, to deny that the estate was other or less than an estate in fee in the premises. These terms, importing a conveyance of the fee, are equivalent to a covenant of general warranty of title running with the land": Association v. Viera, 48 Cal. 580.

There is nothing, therefore, in the other findings which contradicts the ultimate facts set out in the tenth finding, "that the plaintiff at the time of the commencement of this suit was, ever since has been, and still is, the owner in fee simple of the premises described in the complaint on file herein." That finding is conclusive against the defendant's right of possession to the land, and in favor of that of the plaintiff. Findings upon the other issues, which it is claimed by the defendant ought to have been made, were therefore unnecessary: Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589.

No prejudicial error appearing, the judgment is affirmed.

In re ROSE'S ESTATE.*

No. 12,408; December 29, 1888.

20 Pac. 712.

Appeal—Time for Taking.—Under Code of Civil Procedure of California, section 939, providing that an exception to the decision or verdict because not supported by the evidence cannot be reviewed unless the appeal is taken within sixty days after the rendition of the judgment, an appeal from a decree settling an administrator's account, taken within the statutory time after the entry of the decree, but not within sixty days after the decision and the filing of the findings, is not in time to present the question of the insufficiency of the evidence.

APPEAL from Superior Court, Tulare County; W. W. Cross, Judge.

Wal. J. Tuska and W. W. Foote for appellant; Stetson & Houghton for respondent.

PER CURIAM.—This is an appeal by an administrator from a decree settling his account. When the account was rendered, written grounds of contest were filed; and after trial, at which witnesses were examined, the judge of the superior court made findings and a decree whereby it was adjudged that the account presented was not correct, and that the administrator owed the estate more money than the balance of his account showed. The appeal was taken within sixty days after the entry of the decree, but not within sixty days after the announcement of the decision and the filing of the findings. There was no motion for a new trial.

The respondent contends that the question as to the sufficiency of the evidence to sustain the decision cannot be considered; and we think this position must be sustained. It is not necessary to decide whether a motion for a new trial would have been a proper remedy. Section 939 of the Code of Civil Procedure provides that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of

*For opinion in bank, see 80 Cal. 166, 22 Pac. 86.

the judgment." If the appeal be not taken within sixty days from the rendition of the judgment, the question as to the insufficiency of the evidence cannot be considered: Clark v. Gridley, 49 Cal. 105; Handley v. Figg, 58 Cal. 578; Bettis v. Townsend, 61 Cal. 333; Mogk v. Peterson, 75 Cal. 496, 17 Pac. 447. The words "rendition of the judgment" do not mean the same thing as "entry of the judgment." They mean either the announcement from the bench entered in the minutes, or the filing of the findings, if there are findings, or both. But it is not necessary to decide what is the precise meaning of the term here; for in this case both things occurred more than sixty days before the appeal was taken. It may seem a strange result that, in order to present the question of the insufficiency of the evidence, the appeal must be taken within sixty days from an event which may occur long before the judgment is entered. But the statute is explicit to that effect; and it may very well be that the legislature recognized the fact that a long period may happen to elapse between the rendition and the entry of the judgment, and considered it undesirable that questions as to the insufficiency of the evidence should be allowed to remain open so long. We think the provision referred to applies to decisions in probate matters like the one in this case, and hence that the evidence cannot be reviewed on this appeal.

The only questions which can be reviewed upon the appeal are as to the sufficiency of the findings to support the decree, and as to errors in law occurring at the trial. The findings seem to us to be sufficient, and we see no error in law.

The decree appealed from is affirmed.

McFARLAND, J.—I dissent. I do not think that the action of a court in settling an administrator's account was intended to be included in the provisions of section 939 about an appeal from "a final judgment in an action or special proceeding." It is simply a probate order, and an appeal from it is specifically provided for in subdivision 3 of section 963. And, in my opinion, if an appeal be taken from such an order within the sixty days after the order has been entered, as provided in section 1715, the sufficiency of the evidence to sustain the decision may be considered.

HUMBOLDT SAVINGS AND LOAN SOCIETY v. WENNERHOLD et al.*

No. 11,674; February 18, 1889.

20 Pac. 553.

Bond—Liabilities of Sureties.—A Secretary of a Building Association Executed a Bond to well and truly perform and discharge all his official duties, and do all things required by the by-laws, and to perform faithfully all duties required of him, and obey all orders given him by the board of directors. The secretary was confided with the general superintendence of the association's funds, received, cared for, and paid them out, and the performance of these duties by this officer had become the established usage of the association. Held, that his sureties on the bond were liable for moneys of depositors which he had received and entered in their pass-books, but not in the company's books, and converted to his own use; also for moneys taken by him, which had been deposited in the safe for persons who had borrowed the same; and also for moneys taken from the association and converted, he forging a receipt for the same in the name of a third person.

Bond—Duration of Liability.—The Fact That No Term of Office was Ever Fixed or put an end to by any by-law, order, or resolution, does not affect the liability of the sureties, the bond being conditioned that he should perform his duties "so long as he shall continue and be continued in said office." No want of consideration being shown, the sureties could bind themselves for an unlimited period.

APPEAL from Superior Court, City and County of San Francisco.

Manuel Eyre for appellants; A. H. Loughborough for respondent.

FOOTE, C.—Plaintiff brought this action against Wennerhold, Joseph Frank and John Wieland. During its pendency two of the defendants, Joseph Frank and John Wieland, died, and the executors of Frank and the administratrix of Wieland were substituted as defendants. Judgment passed for the plaintiff, from which, and an order denying a new trial, defendants appealed.

*For subsequent opinion in bank, see 81 Cal. 528, 22 Pac. 920.

The cause of action set out in the complaint was the breach of the conditions of a bond given to the plaintiff by one Hartmann, its secretary, upon which Wennerhold, Frank and Wieland were the sureties. The alleged breach consisted in the embezzlement by Hartmann, while acting in the capacity above mentioned, of large sums of money belonging to, or for which the plaintiff was responsible.

The facts attending the affair seem to be that Hartmann embezzled the money which he is charged to have taken, by receiving some of it "from depositors coming to deposit money in plaintiff's bank, and entered such sums in the pass-books of said depositors, but neglected to cause such sums to be entered in the books of the bank. He converted the same to his own use." "The following depositors deposited money, filling out deposit tags; and Hartmann, receiving said money, signed or indorsed said tags with his name as secretary, and returned them to said depositors as their vouchers, but failed to enter such amounts in the books of the bank, but converted the same to his own use." "Said Hartmann took from bags deposited in the vault and safe of plaintiff's bank money set apart for persons who had borrowed the same from the bank, and converted the same to his own use." "And on the following date said Hartmann took from the money of the bank the following sums, filling a check or receipt, to which he forged the name of V. Chapman, so that it appeared that said sums had been paid by him to said Chapman, whereas he had paid her nothing, but appropriated the money to his own use." "All of which was done by Hartmann while acting as hereinafter testified to in the employ of the plaintiff." "To the testimony adduced, and to each question asked in eliciting such testimony, the defendant objected on the grounds—First, that the complaint did not state facts sufficient to constitute a cause of action; second, that it was incompetent, irrelevant, and immaterial." The defendant further contends that the decision is contrary to the evidence, and that certain of the findings are not supported by the evidence.

The bond seems to have been given under the idea that Hartmann, as secretary of the plaintiff, might thereafter from time to time be re-elected, rechosen, and reappointed, or continued in office, or suffered to hold the same. And in point of fact he seems to have been continued in the office of secre-

tary, to which he was first elected, and to have been suffered to hold the same, and exercise its functions, up to the time of about three days before his death by suicide.

The condition of the bond was that if Hartmann, during his term, or during all the time he should hold the office of secretary, should well and truly serve the plaintiff as such secretary so long as he shall continue and be continued in said office, and "well, truly, and honestly perform and discharge all his duties as such officer, and do all things required of him by the by-laws of said corporation, which may now be in force, or which may be hereafter enacted by said corporation, and shall well and truly and faithfully perform all the duties which shall be required of him, and obey all orders and directions given him by the board of directors of said corporation, then this obligation to be void; otherwise to remain in full force and effect."

The averment in the complaint, after setting out the bond in full as having been given, is "that the said bond was conditioned that said Hartmann should well and truly serve this corporation as such secretary, and well, truly, and honestly perform and discharge all his duties as such officer, and all things required of him by the by-laws of the plaintiff, which might then be in force, or which might thereafter be enacted by this plaintiff, as by reference thereto will more fully appear."

The question really is, not what the office Hartmann was to fill was called, but what its duties were, as prescribed by the by-laws or the orders and directions of the board of directors, or which had devolved upon the secretary by the established usage and custom of the bank, with the consent of the directors, before and after the giving of the bond of which the sureties must be held to have had notice, and whether or not he had well, truly, and faithfully performed them. "When a certain class of corporations—for instance, banks—have established, recognized and well known usages, all persons dealing with their agents will be affected with notice of these usages, and the contracts of such corporations will be construed with reference to them": Tayl. Corp., sec. 195, and cases cited.

The interpretation of the terms of the bond is to be governed by the same rules as other contracts: Civ. Code, sec. 2837.

In order to give a proper construction to an instrument of the kind here involved, "the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret": Code Civ. Proc., sec. 1860. The appellate court, in speaking to such a matter, after alluding to the rule laid down as to official bonds in Hubert v. Mendheim, 64 Cal. 213, 30 Pac. 633, said: "But, as was said in that case with reference to bonds given to individuals and private corporations, 'such matters are the subject of private contract, by which the parties may bind themselves in any manner, or to any extent not violative of public policy or positive statute.' These private contracts are to be interpreted like other private contracts with reference to their language and the circumstances under which they were entered into": Fresno Enterprise Co. v. Allen, 67 Cal. 508, 8 Pac. 59.

The record here shows that the banking corporation of which Hartmann was made the secretary started out on a small scale, and that it was the intention of those controlling and directing it that the secretary should be the chief agent in receiving, caring for, and paying out the moneys which were paid in, paid out, and of which it had charge, or belonged to it. To this secretary, in other words, it was the intention of all those concerned to confide the general supervision of its funds, as cashier, teller, bookkeeper, etc. This is shown by the acts of the parties, and all the surrounding circumstances, both before and after the giving of the bond. It was contemplated in the beginning that there would be a time of small affairs, and that a secretary could do all that is ordinarily confided to a receiving and paying teller, cashier, bookkeeper, etc. These duties all seem to have been expected of Hartmann, to have been assumed by him, and to have become the established usage of the bank, if not directly ordered by its trustees, both before and after the making of the bond. It is perfectly apparent to us that this was the expectation of the sureties when they signed the bond, and that they must have known what Hartmann for years had been doing as secretary, and what the nature of his duties was. He had been secretary for about ten years prior to the making of this bond, and had always

performed the same duties before and after the bond was executed.

The complaint, in effect, gives the conditions of the bond, and the breach of it by Hartmann, and states a sufficient cause of action. He was elected secretary, and was continued or suffered to stay in the same office for years, up to the time of his defalcation, without further election or order, and this was in consonance with the terms of the bond, which seem to contemplate just such a continuance or sufferance in office. No term of office was intended to be fixed by the bond; that was to be left to the action of the directors for the time being, whoever they might be. Their term of office did not affect his: Brandt, Sur., sec. 146; Tayl. Corp., sec. 235. It is not shown that his term of office was ever fixed, or put an end to, by any by-law, order, resolution, or custom. And the sureties could bind themselves for such an unlimited period, as no want of consideration is shown; Metropolitan Loan Assn. v. Esche, 75 Cal. 513, 17 Pac. 677. The responsibility of the sureties, as fixed by the court, is in accordance with the words of the bond. Upon the whole case we perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

HUMPHREYS et al. v. HOPKINS.*

No. 12,626; February 27, 1889.

20 Pac. 713.

Replevin by Receiver—Pleadings—Findings—Judgment.—In replevin, plaintiffs alleged that they had been duly appointed and qualified as receivers of a railroad company in another state, which thereupon delivered all its property to plaintiffs, and that the property in question had been wrongfully taken from them by defendant in this

*For subsequent opinion in bank, see 81 Cal. 553, 15 Am. St. Rep. 76, 22 Pac. 892.

state. The answer admitted the appointment and qualification of plaintiffs as receivers, but denied that the company had delivered to them its property, and specifically denied the delivery of the property in question, which defendant claimed to hold as sheriff under an attachment issued against the company. Held, that the issues demanded a finding that the property had been delivered to plaintiffs as receivers before it came into this state, and that a finding that plaintiffs were entitled to its possession when taken from them by defendant was insufficient, it being but a conclusion of law.

APPEAL from Superior Court, City and County of San Francisco; James G. Maguire, Judge.

Frank M. Stone for appellant; F. Z. Blakeman for respondents.

PER CURIAM.—The findings of the court do not respond to the issues. The complaint alleges, in substance, that on the twenty-fifth day of May, 1884, plaintiffs were by an order of the United States circuit court of Missouri, appointed receivers of all the property of the Wabash, St. Louis & Pacific Railroad Company, with authority to take possession of, control, and operate its railroad, and preserve the property; that plaintiffs duly qualified as such receivers, and thereafter the said railroad company transferred and delivered all of its property to the plaintiffs, in pursuance of said order; that plaintiffs took possession of, and ever afterward managed and controlled, the same, until interfered with by the defendant, as hereinafter stated; that the car in controversy is a part of the property so transferred; that, while plaintiffs were in possession of the car, the defendant at the city of San Francisco, April 3, 1885, wrongfully and unlawfully took it from their possession, and still unlawfully detains the same, although a demand for the possession of the car has been made by the plaintiffs.

The answer admits that the plaintiffs were appointed, and that they duly qualified and entered upon the discharge of their duties as receivers, as alleged, but denies that the Wabash, St. Louis & Pacific Railroad Company delivered any property to plaintiffs as receivers, and denies specifically that the car described in the complaint was ever transferred or delivered to plaintiffs by said company. For a further and separate answer defendant (sheriff of San Francisco) averred

that he, as sheriff of the city and county of San Francisco, in obedience to a writ of attachment issued out of the superior court, had taken and held the property on the first day of April, 1885, at the instance of the plaintiffs in an action by Payot, Upham & Co. vs. said Wabash, St. Louis & Pacific Railroad Company, wherein said firm claimed the sum of $641.71 upon an express contract.

The court found that the car in controversy was on the sixteenth day of March, 1885, at the city of St. Louis, lawfully in possession of plaintiffs; that on said last-named day said car was loaded with freight by plaintiffs and sent to the city of San Francisco, where it arrived about April 1st, in the custody of the Central Pacific Railroad Company, which company was the agent of plaintiffs for the purpose of delivering freight and returning the car to plaintiffs at St. Louis; that the defendant wrongfully and unlawfully seized and took said car from the custody of said railroad company on April 3, 1885, and continued to detain the same until September 5th following, when it was taken under due process from the defendant, and delivered to the plaintiffs in this action; that on March 24, 1885, Henry Payot and Isaac Upham were partners doing business in the city and county of San Francisco, and commenced an action against the Wabash, St. Louis & Pacific Railroad Company, as alleged by defendant, and that defendant, as sheriff, took and held possession of the car, as alleged by him.

It is apparent from the allegations of the complaint that the plaintiffs are suing in their representative capacity as receivers, and it is equally clear that the defendant, in his answer, attempts to meet the claim of the plaintiffs solely upon that theory. There is nothing in the complaint to indicate that the plaintiffs intended to sue in their individual capacities. The caption of the complaint is immaterial in cases of this kind; it is the body of the complaint which shows the capacity in which a party sues, not the designation in the title of the cause: Boone, Code Pl., sec. 9. It is not pretended, in fact, that the plaintiffs have any title to the property other than such as they acquired by virtue of the assignment by the company under and in pursuance of the order of the United States circuit court for the eastern district of Missouri.

In view, therefore, of the facts alleged, that plaintiffs were receivers, and that the car was a part of the property of the railroad company, transferred to them as such, and the denials that the car was part of the property transferred as alleged, or that the plaintiffs, as such receivers, ever took possession of it, it became a material issue whether the property had come into the hands of plaintiffs under the assignment from the railroad company, as alleged. The plaintiffs were not entitled to recover unless the property had been actually delivered into their custody before it came into this state. Even if the court had found the fact to be that the property had been delivered to the plaintiffs in Missouri, the evidence is insufficient to support such a finding. The court found in general terms that the plaintiffs were entitled to the possession of the car on the third day of April, 1885, when it was wrongfully taken from them by defendant, and retained by him until taken from him, by due process in replevin, on September 5, 1885. The finding does not answer the objections made to the sufficiency of the finding on the question of delivery. Under the issues it is a mere conclusion—a matter of law. The plaintiffs base their right to recover on certain facts alleged, some of which are denied. The defendant is entitled to specific findings of fact upon those issues. The defendant is a sheriff. He had seized the property as the property of the railroad company under a writ issued in an action against that company at the instance of a plaintiff claiming to be a legal creditor of the company, and this was the justification which he pleaded. If he levied the writ upon the property of the company, as required by the writ, he was justified: Pol. Code, sec. 4187.

Again, the defendant pleaded that the members of the firm of Payot, Upham & Co., plaintiffs in the attachment suit, were citizens of the state of California, and domestic creditors. The court found that Henry Payot and Isaac Upham were copartners doing business in the city and county of San Francisco when the suit was commenced, but did not find whether they were citizens of the state. While, perhaps, the failure to find on this issue was due to a failure on the part of the defendant, upon whom rested the burden to supply the proof, and would not justify the reversal of the case, we think there should have been a finding as to whether said parties were

citizens of the state. The mere fact that they were copartners doing business in the city of San Francisco when the suit was commenced is insufficient.

As we are unable to determine the merits of the case without a finding upon the issue as to whether the car was ever transferred and delivered to the plaintiffs as a part of the property of the Wabash, St. Louis & Pacific Railroad Company the judgment must be reversed; and, as the judge who tried the case in the court below has gone out of office, the case cannot be referred simply for additional findings.

Judgment and order reversed and cause remanded for a new trial.

WIXON v. DEVINE.

No. 12,788; January 25, 1889.

20 Pac. 367.

APPEAL from Superior Court, Sierra County; F. D. Soward, Judge.

Van Clief & Wehe for appellant; Smith & Ford and S. B. Davidson for respondent.

PATERSON, J.—1. The judgment of the court below was entered on July 6, 1887. Notice of appeal was filed and served nearly a year thereafter, to wit, June 29, 1888. As there was no motion for a new trial, therefore, the evidence should not be considered.

2. There are no assignments of error, or specifications of insufficiency of the evidence, in the bill of exceptions.

3. The findings cover the issues, are against the appellant, and, although the record is not in a condition to require of us an examination of the evidence, it is apparent from a cursory review of it that the findings are correct.

Judgment affirmed.

We concur: Works, J.; Sharpstein, J.; Thornton, J.; McFarland, J.

GOLDTREE et al. v. THOMPSON et al.*

No. 11,749; January 29, 1889.

20 Pac. 414.

Wills—Suit by Trustees for Construction.—A complaint by testamentary trustees for a construction of certain trusts in the will, alleging that plaintiffs, who were executors also, had administered on the estate, until by an order or decree of the probate court the funds in their hands as executors were distributed to them as trustees, without stating what disposition, if any, was directed to be made of the trust fund, does not state sufficient facts to enable the court to grant the relief sought, as the will would be superseded by the decree, which is final, a construction of which is all the trustees are entitled to, and an amendment setting out the decree in full should be made.

APPEAL from Superior Court, San Luis Obispo County; D. S. Gregory, Judge.

On rehearing. For former opinion see 15 Pac. 359.

Graves, Turner & Graves for appellants; J. M. Wilcoxon and W. H. Spencer for respondents; William Shipsey, guardian ad litem, for minors.

FOOTE, C.—This action was brought by the trustees, under the will of Jonathan Thompson, deceased, against his heirs at law and the legatees under the will, for the purpose of having the terms of that instrument construed, so that the trustees would be free from doubt as to what their duties were with reference to the trusts confided to them. The court below made its decree determining the method in which the trustees should act in obedience to the trusts contained in the will from which this appeal is prosecuted.

We think the cause should be considered upon appeal, notwithstanding the effort made to dismiss it. The complaint, which seeks to have the trusts contained in the will construed by the court, shows by the averments that, after the trustees had qualified as executors of the will, they entered upon the discharge of their duties as such, "and managed the property

*For subsequent opinion in bank, see 79 Cal. 613, 21 Pac. 50.

of the said deceased in the state of California, paid all the debts of said deceased, and, after due proceedings had in the said estate, all the property thereof was by an order of said probate court, duly made and given on March 13, 1877, distributed to said Patchett, Thompson, and Grierson, as trustees under the said will," etc. It does not appear from the complaint, however, what the terms of that decree were with reference to the disposition of the trust estate, except that it was distributed to the trustees. What the purport of the order of the court was as to carrying out the trusts contained in the will is not stated. The order or decree of final distribution, having been "duly made and given," was binding upon the parties in interest here, subject only to be reversed, set aside, or modified on appeal: Code Civ. Proc., sec. 1666; Estate of Garraud, 36 Cal. 279; Estate of Hudson, 63 Cal. 457; In re Rowland, 74 Cal. 525, 5 Am. St. Rep. 464, 16 Pac. 315. No appeal in the matter appears to have been taken. This being so, it is manifest that the rights of the parties must be governed by the decree. In other words, the will is superseded by the decree. It is therefore immaterial to consider what is the proper construction of the will. The only thing upon which the trustees have a right to the opinion of the court is as to their duties under the decree; and the suit is in effect to obtain a construction of the decree. But the record does not show what the decree was, and therefore the court is practically asked to construe a document which is not before it. It cannot undertake to do that; and it results that the complaint does not state facts sufficient to constitute a cause of action. If the fact be that the will was made a part of the decree, that fact should be made to appear, and the whole of the decree should be given. We therefore advise that the judgment be reversed, and the cause remanded, with permission to file an amended complaint.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with permission to file an amended complaint.

THORNTON, J., Dissenting.—I desire in brief to explain my dissent. The trustees under the will of the testator in this

case (plaintiffs herein), under a well-known head of equity jurisdiction, ask the advice of a court of equity as to the construction of trusts in the will. The property had been distributed by the proper court, under the will, to the plaintiffs as trustees; and it is held in the prevailing opinion that the will is superseded by the decree. How this supersedure is brought about I cannot conceive. The court distributing the property had nothing to do with the construction of the trusts under the will. The question was not before it at all. That court had only to determine in whom the law vested the property under the will. As to what was the meaning or signification of the language declaring the trusts under the will, that court had nothing to say or do. There was no merger in a decree or judgment. Such merger cannot go beyond the matter in issue. If the point or question is not a matter in issue—that is, to be determined in the action by the court in which the suit is pending, and declared by its judgment—the judgment of the court on such point or matter determines nothing which can bind or estop either court or party. And here it clearly appears that the court did determine nothing as to the extent or limits of the trusts. It only distributed the property, as it should have done, to the plaintiffs as trustees. The plaintiffs are held to be trustees by the decree and to be trustees by the will. They are appointed by that instrument. They could not be appointed by the decree. The plaintiffs speak of themselves in the complaint as trustees under the will; and they are so. Because they are recognized in the decree as trustees under the will, they do not cease to be trustees under the will. The will still is the foundation and rule of their duties. They must look to the will as the source of their duties and obligations, and for the extent of such duties and obligations. For these reasons I cannot concur in the judgment of the court dismissing the plaintiffs from the forum, who, as trustees, come into court and ask for that which they have a right to ask—the judgment of the court as to the complicated duties which they have to perform.

CARTER v. PAIGE.*

No. 12,637; March 7, 1889.

20 Pac. 729.

Appeal—Review—Matters not Apparent of Record.—On appeal from a judgment on the judgment-roll alone, which shows that the judgment was entered on default of defendant to answer or demur to an amended complaint, the objection that the amended complaint was not filed within the time provided in the order allowing the amendment, and that it does not affirmatively appear that the time was extended, will not be considered, as the order allowing the amendment is no part of the judgment-roll.

Pleading.—The Fact That the Amended Complaint was Filed After the Time prescribed is an irregularity merely, and can be reviewed only on a motion to set aside the judgment, and on an appeal from the order denying the motion.

APPEAL from Superior Court, Stanislaus County; Charles H. Marks, Special Judge.

D. S. Terry for appellant; Stanton L. Carter for respondent.

McFARLAND, J.—Plaintiff had judgment in the court below. Defendant appeals from the judgment upon the judgment-roll alone.

The judgment-roll shows that, after defendant had answered the original complaint, an amended complaint was filed on the sixth day of June, 1887. There was no answer to the amended complaint. On July 23d—about forty-seven days after the filing of the amended complaint—the court rendered judgment for plaintiff. This judgment commences as follows: "In this action the defendant, Timothy Paige, having been regularly served with process, and having failed to appear and answer to the plaintiff's amended complaint filed herein on June 6, 1887, and served on defendant's counsel on June 2, 1887, and the legal time for answering or demurring to said amended complaint having expired, and no answer or demurrer having been filed to said amended complaint, the

*For subsequent opinion in bank, see 80 Cal. 390, 22 Pac. 188.

default of said defendant, Timothy Paige, in the premises, was duly entered herein according to law on the fifteenth day of July, 1887, upon demand of the plaintiff's attorney in writing filed herein." It then recites that plaintiff introduced evidence upon the matters alleged in the amended complaint; finds from the evidence that all the averments of the said amended complaint are true; and adjudges that plaintiff recover of defendant the sum of $10,500.

There is in the transcript filed by appellant what purports to be an order of the court made April 26, 1887, that "the court grants plaintiff ten days in which to file an amended complaint, and the defendant ten days thereafter in which to file an answer to said amended complaint." The indorsement upon the amended complaint shows that it was not filed within the ten days. And the point (and the only point) made by appellant is that as the amended complaint was not filed within ten days, and as it does not affirmatively appear that there was an extension of time within which to file it, given either by the court or by stipulation of parties, therefore the filing of the amended complaint was unauthorized, and defendant could disregard it, the clerk had no right to enter a default, and the judgment was erroneous.

But, in the first place, on this appeal we can look only at the judgment-roll; and the order allowing the amended complaint is no part of it: Code Civ. Proc., sec. 670; Livermore v. Webb, 56 Cal. 489. The judgment-roll does not show want of jurisdiction, or error, or even irregularity. Whether a default was or was not entered by the clerk was immaterial; Montgomery v. Tutt, 11 Cal. 316.

Moreover, if we could consider the order allowing the amendment within ten days, the fact that the amended complaint was filed after that time would not render it a nullity. It would be, at most, only an irregularity; and it could be reviewed only upon a record made on a motion in the court below to set aside the judgment, and on an appeal from an order denying such motion: Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349. See, also, Lower Kings etc. Co. v. Kings etc. Co., 67 Cal. 577, 8 Pac. 91.

It is unnecessary to consider respondent's objections that the transcript is not properly certified and authenticated, and that it does not contain the whole judgment-roll.

Judgment affirmed.

We concur: Works, J.; Sharpstein, J.; Thornton, J.; Paterson, J.

HANSON v. HANSON.

No. 11,494; March 11, 1889.

20 Pac. 736.

Judgment—Vacation.—The Trial Court has No Power to Review its own order setting aside a judgment for want of service of summons, where the order was regularly made after hearing and consideration.

Judgment—Vacation After One Year.—A Judgment Void for want of jurisdiction may be set aside on motion made on notice, though more than a year has elapsed since entry of the judgment.

APPEAL from Superior Court, Lake County; Rodney J. Hudson, Judge.

Action for divorce by J. F. Hanson against Delia Hanson. Defendant appeals from an order setting aside an order vacating a judgment by default.

P. M. Sullivan, J. J. Bruton, E. W. Britt and Ball & Craig for appellant; D. M. Hanson, A. E. Noel and R. W. Crump for respondent.

HAYNE, C.—Appeal from an order setting aside an order vacating a judgment by default. The action was for divorce. No answer having been put in, the default of the defendant was entered, and after evidence had been taken a decree of divorce was made. After more than a year from the entry of this decree the defendant moved, upon notice, to have the decree set aside upon the ground that she had never been served with summons. This motion was granted; and it must be assumed from the record that it was granted upon the

ground upon which it was made, viz., that there had been no service of summons upon the defendant. About three weeks after this the court made a second order setting aside the first order. The ground upon which this second order was made does not appear from the record. But it is stated by the counsel for the respondent that it was made upon the ground that more than a year had elapsed between the entry of the decree and the motion to set it aside, and that therefore the defendant could not have it set aside upon motion, but was obliged to resort to an action; in other words, that the court had no power to act in the way it did. But we think that the court had such power. If the decree was made without service of process upon the defendant, and without appearance by her, it was absolutely void. And it was held in People v. Greene, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197, after careful examination of the authorities, that a judgment which is void for want of jurisdiction over the party may be set aside on motion, made upon notice, notwithstanding the fact that more than a year has elapsed since the entry of such judgment. The only difference between that case and this is that there the judgment was void upon the face of the judgment-roll, while here the decree (having been entered upon an affidavit which was sufficient in form, though false in fact) was not void upon the face of the roll, but had to be shown to be void by evidence of the want of service. But while this might make a difference upon a collateral attack, it makes none upon a direct attack. And it has been held that a motion made upon notice is a direct, and not a collateral, attack: People v. Mullan, 65 Cal. 396, 4 Pac. 348; People v. Greene, supra.

The court, therefore, had power to make the order setting aside the decree; and such order was regularly made after hearing and consideration. This being the case, the court had no power to vacate it because subsequent reflection had induced it to believe that it was erroneous. Litigation must have some end. There must be some time when a judgment or order which the court had power to make becomes final, and the party is turned over to the appellate court for relief. It is true that there are some cases in which a trial court may review its own action; but such cases are prescribed by statute, and the trial court is confined to such cases, and has no power in review in other cases: Carpenter v. Superior Court,

75 Cal. 596, 19 Pac. 174; Wunderlin v. Cadogan, 75 Cal. 617, 17 Pac. 713. And there is no provision authorizing the review by the trial court of an order setting aside a judgment for want of service of summons, where such order was regularly made after hearing and consideration. It is true that where a judgment or order was inadvertently or improvidently made, as, for instance, where the court was imposed upon by some trick or artifice, or where it did not intend to make the order entered, as where there has been some clerical misprision, the court may set it aside. But this, being an unusual case, will not be presumed upon appeal, but must be shown affirmatively: Carpenter v. Superior Court, supra; Wunderlin v. Cadogan, supra. Unless this were so, no case could be reversed on appeal unless the record contained an affirmative showing that there had been no trick or artifice, or other case of inadvertence or improvidence, which is certainly not necessary.

But, if the court had the power to review its action because it had come to a different conclusion after reflection, we think that, even upon this theory, the order appealed from must be reversed; for, in our opinion, the first order was properly made: See McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61.

We therefore advise that the order appealed from be reversed and the appeal from the judgment dismissed.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed and the appeal from the judgment dismissed.

SYMONS v. BUNNELL et al.*

No. 12,558; March 15, 1889.

20 Pac. 859.

Rules of Court—Suspension.—Rules of Court are but a Means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it.

New Trial—Surprise—Affidavits.—Where the Affidavits are Conflicting as to the question of surprise, made the ground of a motion for a new trial, the court below cannot be said to have acted without the exercise of a proper discretion.

APPEAL from Superior Court, Tuolumne County; J. F. Rooney, Judge.

Ejectment by William Symons against E. F. Bunnell and Joseph Clark. Judgment for plaintiff, and defendants appeal. They complain that the case was set for trial on plaintiff's motion, without any notice of such motion, and without consent; that such notice or consent was required by a rule of the trial court; and that the court should have granted a continuance for that reason.

I. M. Kalloch (Theodore Bradley of counsel) for appellants; F. D. & G. W. Nicol and P. W. Bennett for respondent.

FOOTE, C.—An appeal from a judgment in ejectment and an order denying a new trial. The grounds of the contention of the appellants are that the court below abused its discretion in not allowing a continuance of the cause upon their motion, and in denying their motion for a new trial based upon surprise which ordinary prudence could not have guarded against. The action of the court, under the circumstances (as stated in the affidavits used in the motions to set aside the judgment and for a new trial), in going on with the trial of the case in violation, as it is alleged, of one of its rules, was not erroneous. Such rules are but "a means to accomplish the ends of justice," and it is always in the power

*For subsequent opinion in bank, see 80 Cal. 330, 22 Pac. 193, 550.

of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it: Pickett v. Wallace, 54 Cal. 147, and cases cited. The affidavits were conflicting as to the question of surprise, and the court below cannot be said to have acted without the exercise of a proper discretion. The defendants have been deprived of no legal right, and the judgment and order should be affirmed.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

WHITE et al. v. LEE et al.

No. 12,814; April 18, 1889.

21 Pac. 363.

Mining — Placer Claims — Location and Boundaries.—Revised Statutes of the United States, section 2324, providing that upon entering a mining claim "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," requires the boundaries of a placer claim to be thus marked, though the claim is coextensive with a legal subdivision of land surveyed under the government system, and though sections 2329 and 2331 provide that the entry of land so surveyed shall, as to its exterior limits, conform to legal subdivisions, and that, where placer claims are upon surveyed lands, and conform to the legal subdivisions, no further survey or plat shall be required.

APPEAL from Superior Court, Placer County; B. F. Myers, Judge.

Action by Lincoln White and William Singer, Jr., against George Lee and Jesse S. Wall, to determine the right to a gold-bearing placer mine known as the "Scott Placer Mine." The mine was located on, and was coextensive with, the southwest quarter of the northwest quarter, section 22, township 11 north, range 7 east of the Mount Diablo meridian, in

Placer county. Judgment for plaintiffs, and defendants appeal.

William Singer, Jr., and Hale & Craig for appellants; C. A. & F. P. Tuttle for respondents.

HAYNE, C.—Action to determine the right to a mining claim. Judgment for defendants. Plaintiffs appeal. In 1886 the grantors of the plaintiffs located the land, marked off the boundaries, and did all the other acts required of them by law, and therefore they acquired a valid claim, if there was no prior right in the grantors of the defendants. The latter posted and recorded notice of location, but failed to mark off the boundaries. The statute requires that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced": Rev. Stats., sec. 2324. And it is well settled that a failure to comply with this requirement invalidates the claim. It is contended for the respondents, however, that the requirement does not apply where the public surveys have been extended over the land, and the claim is for the whole of a legal subdivision; and this is the only question to be determined. The learned counsel for the respondents expressly says: "The one point to be passed upon by the court in this case is whether in locating a placer mining claim by legal subdivisions on surveyed ground it is necessary to mark the lines of the location." The position is that this exception to the general requirement follows from other provisions of the Revised Statutes. But we do not think that this position can be maintained. Section 2329 provides, among other things, that "where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands." This, however, simply provides where the claimant shall run the lines of his claim. It does not at all dispense with the requirement as to how the lines shall be marked or evidenced. Section 2331 provides that "where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required," etc. This provision does not refer to the marking by the claimant of the boundaries of his claim upon the ground, but to the plat and survey which are to be filed upon the application for the

patent. Nor do we see any provision which dispenses with the general requirement that the boundaries shall be marked.

The construction contended for does not seem to us to be in harmony with the general purpose of the act. The purpose of the requirement that the claimant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter section of a particular number had been taken up. For this reason it is required that the boundaries shall be "distinctly marked upon the ground." The construction contended for by the respondents would, in our opinion, defeat the purpose of the requirement. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial.

WELSH, Road Overseer, v. GOULD.

No. 12,434; April 18, 1889.

21 Pac. 364.

Appeal.—A Finding of the Court will be Affirmed, where it cannot be said upon the record that the decision was erroneous.

APPEAL from Superior Court, Butte County; Leon D. Freer, Judge.

Action by Columbus Welsh, as road overseer, against E. H. Gould, to abate a nuisance. Defendant had built a fence across one of the public roads running through plaintiff's

district, and the latter had removed it, only to find it rebuilt by defendant, who threatened to rebuild it as often as it was removed. On the trial defendant claimed that there never was a road there, and also, if there had ever been one, it had been closed by a decree of the superior court in an action wherein this defendant was plaintiff and the county of Butte defendant, to quiet plaintiff's title to certain land therein described. Judgment for defendant, and plaintiff appeals.

John C. Gray, district attorney, for appellant; P. O. Hundley for respondent.

HAYNE, C.—The question upon which this case turns is whether there was a public road through the land of defendant. The court below found that there was not. And we cannot say upon the record before us that its action should be disturbed. We therefore advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

STOVER v. BAKER.

Nos. 11,993, 12,355; April 18, 1889.

21 Pac. 428.

Trial—Sufficiency of Finding to Support Judgment.—In an action to recover money alleged to have been received by the defendant as the agent of the plaintiff on the sale of certain property of plaintiff, the latter alleging that the agent had falsely represented the amount received, and had thereby induced him to settle for a sum much less than he was entitled to, findings that the agent had agreed with the plaintiff on the amount due him, that no false representations had been made, and that the amount agreed upon had been paid, are sufficient to support a judgment for defendant.

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

John Gale and T. M. Osment for appellant; Van Clief & Gear for respondent.

SHARPSTEIN, J.—This action is for the recovery of money alleged to have been received by the defendant as the agent of the plaintiff, on account of a sale by the defendant, under the authority of the plaintiff, of his interest in a water right, for which, it is alleged, defendant received $15,000, and fraudulently concealed the fact from the plaintiff, who was induced by the false representations of the plaintiff to settle with him for $1,000. The court found that the defendant sold the interest of the plaintiff in the water right, together with other interests therein, and afterward settled with plaintiff for his interest in said water right. That defendant made no false representations in connection with said settlement, and paid to plaintiff the amount then agreed upon. Judgment was entered for the defendant. Plaintiff moved for a new trial, which was denied, and this appeal is from the judgment and the order denying the motion for a new trial. Appellant insists that the findings do not support the judgment, and that the evidence is insufficient to justify the findings. We think the finding that the defendant settled with plaintiff for his interest in said water right, and made no false representation in connection therewith, and paid plaintiff the amount agreed upon in said settlement, fully supports the judgment. The evidence upon the material issues is conflicting, and we cannot disturb the findings, without violating an old and well-established rule of this court. Judgment in cause No. 11,993 and order in cause No. 12,355 affirmed.

We concur: McFarland, J.; Thornton, J.

DORLAND v. BERNAL et al.

No. 11,928; April 18, 1889.

21 Pac. 435.

Appeal—Record—Absence of Judgment-roll.—An appeal from a judgment, and from an order discharging a rule requiring plaintiff to show cause, etc., will be dismissed when the transcript does not contain a copy of the judgment-roll.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

For opinion on former appeal, see 4 Pac. 1065.

Moses G. Cobb for appellants; J. M. Wood (J. C. Bates of counsel) for respondent.

PER CURIAM.—As stated in the notice of appeal, this appeal is from a judgment entered June 1, 1886, and from the order discharging the order upon the plaintiff to show cause, etc., made on the twenty-third day of July, 1886. The transcript does not contain a copy of the judgment-roll, and is fatally defective in that respect. There is no order of July 23, 1886, in the transcript, and this appeal was taken more than sixty days after that date. Appeal dismissed.

POWELL v. SUTRO.*

No. 11,728; April 20, 1889.

21 Pac. 436.

Change of Venue—Case Transferred from Justice's to Superior Court.—Where the defendant in an action commenced in a justice's court asks to have the cause transferred to the superior court of the county where he is sued, for the reason that the cause involves the legality of a tax, there is no authority, upon the transfer being made, to transfer the cause to another county for trial.

*For subsequent opinion in bank, see 80 Cal. 559, 22 Pac. 308.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Edmund Tausky for appellant; Moore & Reed for respondent.

THORNTON, J.—This action was commenced in a justice's court in the county of Alameda. The defendant set up in his answer facts going to show that the determination of the cause would necessarily involve the legality of a tax, and therefore, on his motion, the cause was transferred to the superior court of the county of Alameda for trial. The defendant then claimed in that court that he was, and had been for many years, a resident of the city and county of San Francisco, and demanded that the place of trial be changed to the superior court of the city and county above mentioned. This demand was denied, and thereupon he prosecuted an appeal to this court. We find no power vested in the superior court to change the place of trial in this case. The defendant, having been sued in a justice's court, asks that the cause be transferred to the superior court of the county where he is sued, for the reason mentioned above, and his request is granted. When the cause gets to such superior court the defendant must try his cause in that court. The law makes no provision for its removal to any other court. Order affirmed.

We concur: McFarland, J.; Sharpstein, J.

MALLOY v. HIBERNIA SAVINGS & LOAN SOCIETY et al.

No. 11,726; April 22, 1889.

21 Pac. 525.

Negligence — Dangerous Premises—Pleading.—A complaint alleged that defendants were the owners of a certain lot in San Francisco; that on or about a certain day they did unlawfully, wrongfully, and negligently maintain thereon, and about ten feet from a public traveled street, a privy-vault, filled to the surface with the contents

thereof, and of the depth of ten feet, without any guard or protection, and without any inclosure to separate it from the public street; that prior thereto they did unlawfully and negligently remove the fences inclosing the privy-vault, and all the covering around the same, and removed the building adjoining same, and prior thereto had commenced grading said lot and removing the earth therefrom, the premises being then open and accessible for teams and workmen; that by reason of their negligent acts in leaving the vault thus exposed and unprotected, without any fence or inclosure separating it from the street, plaintiff's minor child, three years of age, without any fault of plaintiff, fell into the same, and was drowned; wherefore he prayed damages. Held, that it stated a cause of action.[1]

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawler, Judge.

Action by Daniel Malloy against the Hibernia Savings & Loan Society, John Grant, Julius Platshek and Samuel Platshek, for negligently causing the death of plaintiff's minor child. The second amended complaint was as follows:

"The plaintiff complains of the defendants and alleges in this, his second amended complaint: (1) That on and prior to the sixteenth day of August, 1876, he was, and still is, the father of William Malloy, a minor child of the age of three years and ten months, now deceased. (2) That the defendant, the Hibernia Savings & Loan Society, was on and prior to the said sixteenth day of August, 1876, and is now, a corporation under and by virtue of the laws of the state of California. (3) That on the said sixteenth day of August, A. D. 1876, the said defendants were the owners of, and had possession, management, and control of, certain real estate, being a lot about one hundred and seventy-five by two hundred feet, more or less, on the southeast corner of Bryant and Second streets in the city and county of San Francisco, and were the owners of, and in the possession, management, and control of, the buildings on said real estate, and all improvements connected therewith and pertaining thereto. (4)

[1] Cited and approved in Loveland v. Gardner, 79 Cal. 320, 21 Pac. 766, applying the rule to a case where injury has accrued to domestic animals, belonging to the plaintiff, through the defendant negligently constructing and maintaining his barb-wire fence.

Cited with approval in Loftus v. Dehail, 133 Cal. 217, 65 Pac. 380, but explained as not having been decided on the principle of attractive nuisance.

That the said defendants, on the said sixteenth day of August, 1876, while the owners of said real estate and the buildings thereon and improvements connected therewith, and while in the possession thereof and having the care, control, and management thereof, did unlawfully, wrongfully, and negligently keep and maintain, and suffer and permit to be and remain, upon said real estate (at and near the buildings and improvements thereon), and connected therewith, and about eight or ten feet from the sidewalk of Bryant street—a public traveled street in said city and county aforesaid—a certain privy-vault, pit, sink, cesspool, or vault, filled to the surface of the earth with the contents thereof, and of the depth of about ten (10) feet, and nine (9) feet long by six and a half (6½) feet in width, without any guard, wiring or protection whatever over or around the same, and without any inclosure to separate the same from the sidewalk of Bryant street aforesaid, and in an unguarded, negligent and dangerous condition. (5) That the said defendants, on or about the tenth day of August, 1876, as plaintiff is informed and believes, being as aforesaid the owners of, and in the possession, control and management of, the said real estate and the buildings and improvements thereon and pertaining thereto, and of an inclosure and fence (separating said Bryant street from said privy-vault, pit, and sink) then upon the same, did unlawfully, wrongfully, and negligently remove the fences inclosing the said privy-vault, sink, cesspool, pit, or vault from Bryant street as aforesaid, and all the covering over and around the same connected therewith, and removed a portion of the building adjoining the same, and raised a portion thereof two or three feet from the ground for the purpose of removing the same, and previous thereto had commenced the work of grading said lot of land and of hauling and removing the earth therefrom (said premises), then open and uninclosed, and accessible for teams and conveyances then employed by said defendants, their agents and servants, in removing the earth therefrom, and in hauling and removing the improvements and material thereof; by reason of which said wrongful, unlawful, and negligent acts and omissions of said defendants, their agents and servants, in suffering and permitting the said privy-vault, sink, cesspool, or vault to be and remain at and upon their said premises and

property, and in removing the inclosure and covering thereof, and permitting the same to be and remain in said open, uncovered, and dangerous condition as aforesaid, and for want of a sufficient guard, covering, and protection over or around the same, or a fence or inclosure separating it from said Bryant street aforesaid, or any guard, covering, or protection whatever, the plaintiff's minor child, without any fault or want of care on the part of plaintiff, fell into the same, and was, on said sixteenth day of August, A. D. 1876, drowned therein, and was taken out of the same dead, to the damage of the plaintiff in the sum of $25,000. Wherefore plaintiff prays judgment against the said defendants for the sum of $25,000 damages, and the costs of this action."

Defendants demurred to the complaint for failure to state a cause of action, which demurrer was sustained, and plaintiff appeals.

Edward P. Cole for appellant; Tobin & Barry and Frank Eisner & Platshek for respondents.

THORNTON, J.—This action was brought by the father against the defendants for negligently causing the death of his minor child. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. This ruling on the demurrer presents the only point for consideration. We have examined the complaint and are of opinion that the court erred in its ruling on the demurrer. The judgment is therefore reversed and the cause remanded, with directions to the court below to overrule the demurrer to the complaint. So ordered.

We concur: McFarland, J.; Sharpstein, J.

CRAMER v. TITTEL et al.*

No. 11,723; April 22, 1889.

21 Pac. 750.

Appeal—Brief Stricken Out for Impropriety.—Respondent's brief, after charging the commission of perjury by appellant in his answer, as to a fact alleged to be within his attorney's knowledge, continued: "When counsel can be permitted to draft pleadings and present them to their clients for verification, and the pleadings being drawn from facts within the knowledge of counsel, and the counsel causes his client to willfully commit perjury," etc. Held, a gross violation of professional ethics, and that the brief should be stricken out, with permission to file another within ten days, or the judgment would be reversed without an inspection of the record.

APPEAL from Superior Court, City and County of San Francisco; J. G. Maguire, Judge.

Action by Cramer against Tittel and another. Defendants appeal.

Robert Ash, John H. Boalt, Hall & Rodgers and Van Ness & Roche for appellants; J. J. Coffey and W. H. Tompkins for respondent.

PATERSON, J.—Counsel for respondent concludes his written argument with the following peroration: "Let the case be reviewed. The complaint charges notice of assignment to Huber and Tittel, and to Mr. Ash, their attorney, before this action of Cramer v. Tittel; yet in the face of the verified complaint, the evidence of Tittel, Huber, Nobman, Hartman and Hoffman, and answers drawn by Mr. Ash, as attorney, and without any reservation, B. Ernest Tittel, under the solemnity of an oath, adds another crime to the rascality he had practiced on Lichtnock by committing willful perjury in denying that they, or either of them, knew, or had any notice whatever, that Cramer was the assignee. When counsel can be permitted to draft pleadings and present them to their clients for verification, and the pleadings being drawn

*For subsequent opinion, see 79 Cal. 332, 21 Pac. 750.

from facts within the knowledge of counsel, and the counsel causes his client to willfully commit perjury by an utter disregard of the solemnities of the obligation of an oath, the time has come when perjury can be placed at a premium, and too designing and artful practitioners, assisted with clients of elastic consciences, will be found ready to swear to any fact essential to obtain the end sought. Respondent's counsel has been extremely careful to present this case as disclosed by the record, with page of same, seeing from the brief of counsel for the appellant an evident desire on his part to misstate both the law and the facts, and thereby try to mislead the court." Counsel forgets that this is not an action against the defendants for perjury, nor against their attorney for subornation of perjury, or for disbarment. Such charges should be made only under oath, and in the proper court. Placing them in a brief for the records of this court is a gross violation of professional ethics. The brief for respondent is stricken out, with permission to file another brief within ten days, or the judgment will be reversed without an inspection of the record.

We concur: Beatty, C. J.; McFarland, J.

MAIR v. FORBES et al.

No. 11,431; May 1, 1889.

21 Pac. 552.

Negotiable Instruments—Bona Fide Holders—Complaint.—An answer in an action by one claiming to be a bona fide indorsee for value before maturity of a bill of exchange drawn on and accepted by defendants' testator, denying on information and belief that the drawer of the bill ever transferred it to plaintiff by indorsement or otherwise, as alleged in the complaint, that it was ever delivered to plaintiff, that he paid any value therefor, or that he was ever the bona fide holder or owner thereof, puts in issue plaintiff's title to the bill, and it is error to render judgment in his favor without proof of title.

APPEAL from Superior Court, City and County of San Francisco; J. F. Sullivan, Judge.

Action by Hugh Mair against Charles Forbes and Mary A. Forbes, executor and executrix of the will of Alexander Forbes, deceased, upon a bill of exchange alleged to have been drawn by Robert Knox on said Alexander Forbes, for £500, and accepted by the latter. The complaint alleged that said Knox, for value, and before maturity, indorsed and delivered the same to respondent, who was the holder and owner thereof, and that the defendants refused to pay it when due. Defendants answered, denying that the said Knox transferred the bill to plaintiff by indorsing the same as alleged in the complaint, or in any other manner. They denied that the bill was ever delivered to plaintiff, that he paid any value therefor, or that he was ever its bona fide holder or owner. These denials were made upon information and belief. There was judgment for plaintiff, and defendants appeal.

Henry E. Highton for appellants; Rosenbaum & Sheeline for respondent.

BEATTY, C. J.—Action upon bill of exchange against executors of deceased acceptor. The pleadings are verified. Judgment was rendered in favor of the plaintiff on the pleadings, defendants excepting. We think the answer was sufficient to raise an issue as to the ownership of the bill, and consequently that the rendition of the judgment without any proof of plaintiff's title was error. Judgment reversed, and cause remanded.

We concur: Works, J.; Paterson, J.

MARTIN v. SPLIVALO et al.

No. 11,938; May 3, 1889.

21 Pac. 547.

Appeal—Presumptions.—Where None of the Pleadings or Proceedings in the court below prior to judgment appear in the transcript, and the evidence is not brought up, the judgment must be presumed to be right.

APPEAL from Superior Court, Santa Clara County; F. E. Spencer, Judge.

A. D. Splivalo for appellants; Houghton & Reynolds for respondent.

WORKS, J.—This is an appeal from a money judgment recovered by the respondent against the appellants. The record shows no errors. None of the pleadings or proceedings in the court below, prior to the judgment, appear in the transcript, and the evidence is not brought up. In this condition of the record we must presume that the judgment appealed from was right. Judgment affirmed, with ten per cent damages.

We concur: Beatty, C. J.; Paterson, J.

HAAS v. WHITTIER et al.

No. 12,927; May 6, 1889.

21 Pac. 547.

New Trial—Objections to Verdict.—An order granting a new trial, applied for on the ground that the evidence was insufficient to justify the verdict, will not be reversed unless a manifest abuse of discretion appears.

APPEAL from Superior Court, Los Angeles County; W. P. Gardiner, Judge.

Action by Abe Haas, assignee in insolvency, against W. F. Whittier and others. Judgment was rendered for defendants, and the plaintiff obtained an order for a new trial.

Barclay, Wilson & Carpenter for appellants; Graves, O'Melveny & Shankland and Chapman & Hendrick for respondent.

WORKS, J.—This is an appeal from an order granting the respondent a new trial. One of the grounds of the motion was that the evidence was insufficient to justify the verdict. Without attempting to review the evidence, or to determine what weight should be given to it, which will be within the province of the lower court on a second trial, it is sufficient to say that the evidence was such that this court will not set aside the order granting a new trial. Such an order will not be reversed unless a manifest abuse of discretion appears: Gerold v. Brunswick, 67 Cal. 124, 7 Pac. 306. No such abuse of discretion appears in this case. Order affirmed.

We concur: Beatty, C. J.; Paterson, J.; Sharpstein, J.; McFarland, J.; Thornton, J.

DALMAZZO v. DRYSDALE et al.

No. 12,956; May 15, 1889.

21 Pac. 553.

Appeal—Assignment of Errors.—Where an appellant fails to point out any error in the order or judgment appealed from, within the time allowed him to file briefs, the supreme court will not examine the record, but will affirm the decision of the trial court.

APPEAL from Superior Court, San Diego County; E. Parker, Judge.

John M. Lucas for appellants; John D. Works and Harry L. Titus for respondent.

BEATTY, C. J.—This case was submitted without oral argument on briefs to be filed, the appellants to file the first brief. The time allowed appellants to file their brief has elapsed, no brief has been filed by appellants, no extension of time has been asked, and respondent moves for affirmance of the judgment and order appealed from. Where appellant fails to point out any error in the judgment or order appealed from, the court will not look into the record for the purpose of discovering error. Judgment and order affirmed. Remittitur forthwith.

BRYAN v. TORMEY.*

No. 11,873; May 20, 1889.

21 Pac. 725.

Quieting Title.—A Complaint to Quiet Title Alleged That Plaintiff was the owner and in possession of the property. The findings were that plaintiff was the owner, but that defendant was in possession, and judgment was rendered that plaintiff's title be quieted, and that defendant be removed from possession. Under Code of Civil Procedure of California, section 380, the action may be maintained by one not in possession. Held, that though the judgment was in direct contradiction to the complaint, it would be modified on appeal so as to omit the part relating to possession, and would be thus affirmed, without costs to either party.

Quieting Title.—M. Took Possession of Land in 1861, Claimed It as his own, cultivated it regularly, and paid all the taxes. After eleven years he sold to his brother, who took possession, improved the property, and paid the taxes. After five years he conveyed to plaintiff's testator, who took possession, exercised acts of ownership, and held possession till 1881. M. knew of his brother's possession, and knew that he sold to plaintiff's testator, and that the latter was in possession and improving the property, and made no claim to the land, or any protest, till about 1880, when he discovered there was no deed on record of the original conveyance by himself. He then gave a deed of the land to defendant. Held, that there was a presumption of title in M.'s brother, which was not rebutted by the fact that he originally entered under an oral contract of purchase, or by the fact that there was no deed on record conveying to him.

*For subsequent opinion in bank, see 84 Cal. 126, 24 Pac. 319.

Quieting Title.—In View of Such Presumption, It is Immaterial that declarations of M. that he had conveyed to his brother were erroneously admitted in evidence. Defendant knew that M. was not in possession when he conveyed to him, and there was no evdence, except the presumption arising from the deed, that defendant gave any consideration for the land. He knew that M.'s brother had conveyed the land as if it was his own. He did not make inquiries of the occupants of the land, and, although he heard that there was a deed from M. to his brother, there was no evidence that he made any inquiries of M. about it, but he made inquiries of the widow of M.'s brother, and searched the records. Held, that defendant was not a bona fide purchaser.

Quieting Title.—The Pleadings Having Alleged That Plaintiff was the owner in fee of the property, a finding that he was the owner in fee is sufficient to show that fact, though there are probative facts stated tending to show the contrary, but which are not necessarily inconsistent with the fact of plaintiff's ownership; especially where the findings further state that defendant never had any title or interest in or to said land.

APPEAL from Superior Court, Alameda County; N. Hamilton, Judge.

Stanly, Stoney & Hayes for appellant; W. H. H. Hart and Aylett & Cotton for respondent.

HAYNE, C.—Action to quiet title to certain land in the town of Berkeley. Both parties claim through one John Mathews, in whom the title stood of record until August 13, 1880, when he conveyed to the defendant, who was his son in law. The plaintiff's position is that, prior to the conveyance to the defendant, John Mathews had conveyed to his brother, Peter Mathews, through whom she claims. The trial court gave judgment for the plaintiff, and the defendant appeals. Several points are made by the learned counsel for the appellant, but we deem it sufficient to notice the following:

1. It is contended that the complaint does not support the judgment. The complaint alleges that the plaintiff was the owner and in possession of the property, while the findings are that the plaintiff was the owner, but that the defendant was in possession; and the judgment is that the plaintiff's title be quieted, and that the defendant be removed from possession. The findings and judgment, therefore, so far as the

possession is concerned, are in direct contradiction of the complaint. It is obvious that the plaintiff cannot have a judgment in direct contradiction of her complaint: Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518. But the right to have the title quieted does not, under our statute, depend upon the plaintiff's possession. The action may be maintained by one out of possession: Code Civ. Proc., sec. 380; Hyde v. Redding, 74 Cal. 493, 16 Pac. 380. And its character is not changed by the circumstance that the defendant is or is not in possession: Polack v. Gurnee, 66 Cal. 266, 5 Pac. 229, 610. The judgment may therefore be modified by leaving out the part relating to the possession; and, inasmuch as this was "an apparent error which the counsel for appellant might have corrected below by specific motion for that purpose, we think it not equitable to tax the costs to the respondent": Cassin v. Marshall, 18 Cal. 692; Noonan v. Hood, 49 Cal. 293.

2. It is argued that the findings do not show that the legal title was in plaintiff's testator. It was alleged, however, that the plaintiff is "the owner in fee" of the property, and the finding is in the same language. The allegation that the plaintiff is the owner of the property is of an ultimate fact: Payne v. Treadwell, 16 Cal. 242; Garwood v. Hastings, 38 Cal. 217; Ferrer v. Insurance Co., 47 Cal. 431; Miller v. Brigham, 50 Cal. 615; Rough v. Simmons, 65 Cal. 227, 3 Pac. 804; Thompson v. Spray, 72 Cal. 534, 14 Pac. 182; Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183. The findings are sufficient if they follow the language of the pleadings (Hihn v. Peck, 30 Cal. 286), or if they make a definite reference to the pleadings, as has been held in numerous cases. Hence the finding as to the ownership in fee is sufficient, and shows that the legal title was in the plaintiff: Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879. And its force is not destroyed by the finding of certain probative facts tending to show that the legal title is in the defendant. It may be conceded that where the probative facts found are necessarily inconsistent with the finding of the ultimate fact, the latter may be treated as a mere conclusion. But where the ultimate fact inferred does not necessarily result from the probative facts found, these latter are not sufficient as a finding, taken by themselves (Emmal v. Webb, 36 Cal. 204; Biddel

v. Brizzolara, 56 Cal. 381, 382; Knight v. Roche, 56 Cal. 18; Packard v. Johnson, 57 Cal. 183, 184; Younger v. Pagles, 60 Cal. 520), and are controlled by a finding of the ultimate fact: Barrante v. Garratt, 50 Cal. 114; Edwards v. Bank, 59 Cal. 148. This must necessarily be so, for the function of findings is to establish the facts with certainty, and not to deal in probabilities. In the case before us the finding of the defendant's chain of title is not necessarily inconsistent with the plaintiff's ownership; for it may be that John Mathews conveyed to his brother Peter before he "made a deed" to the defendant (Smith v. Acker, 52 Cal. 219), which, as stated below, is what must be taken to be true upon the evidence. This conclusion is strengthened by the finding that the defendant "never had any estate, right, title, or interest in or to said land, or any part thereof."

3. It is urged that there is no evidence that John Mathews ever conveyed the property to his brother Peter, except certain declarations of John to the general effect that he had done so; and that the admission of such declarations against defendant's objections was erroneous. There was no direct evidence of the conveyance in question, and we think it possible that the admission of said declarations was error: See Thompson v. Lynch, 29 Cal. 191; Tompkins v. Crane, 50 Cal. 480. But, assuming this to be so, we think that the error was immaterial, because, upon the undisputed facts of the case, it must be presumed that such a conveyance was made. A presumption may supply the place of direct evidence; and, if not controverted, a court or jury is bound to find in accordance therewith: Code Civ. Proc., sec. 1961; Leviston v. Ryan, 75 Cal. 294, 17 Pac. 239; Speegle v. Leese, 51 Cal. 415. The question, then, is whether upon the facts shown by the record a presumption arises of a conveyance from John to Peter Mathews; and we think that it does arise from the long continued possession of the plaintiff's predecessors in interest, and their open and notorious acts of ownership over the property. "Possession," says Angell in his work on Limitation, "by the law of England and of this country, or quasi possession, as the case may be, is prima facie evidence of property and of a seisin in fee. The longer the continuance of the possession, and the absence of the disturbance of it, the greater is the length to which courts of justice will go in supporting

the conclusion that there was a legal origin for it; and, in order to render the title of the possessor complete, they will presume collateral facts, as livery of seisin, execution of deeds, etc., agreeably to the maxim, Ex diuturnitate temporis, omnia praesumuntur solemnitur esse acta": 5th ed., sec. 4; and see Code Civ. Proc., sec. 1963, subd. 12.

The doctrine as to presumption of grants is usually applied in cases of easements. But it is not confined to such cases. In the language of Story, J., delivering the opinion in Ricard v. Williams, 7 Wheat. 109, 5 L. Ed. 410: "A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing title in, the party in possession." And the doctrine was applied as to the land itself in a recent and well-considered case in the supreme court of the United States, in which it was distinctly held that the presumption was not a mere inference of fact—in other words, that it was not necessary for the court or jury to believe that a conveyance was in fact executed—the court, per Field, J., saying: "It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its nonexecution" (Fletcher v. Fuller, 120 U. S. 547, 30 L. Ed. 762, 7 Sup. Ct. Rep. 667), and the authorities fully sustain this proposition.

What period, then, is sufficient to raise the presumption? From the nature of the case, there ought to be no fixed and absolute period: See 120 U. S. 550, 30 L. Ed. 764, 7 Sup. Ct. Rep. 675. Each case is to be governed largely by its own circumstances. But there are certain analogies which may aid in arriving at a conclusion. In the case of easements, the period usually adopted in the older states is twenty years, which was in analogy to the statute of limitations. In this regard Bronson, J., delivering the opinion of the court of errors, said: "The modern doctrine of presuming a right by grant or otherwise to easements and incorporeal hereditaments,

after twenty years of uninterrupted adverse enjoyment, exerts a much wider influence in quieting possession than the old doctrine of title by prescription, which depended on immemorial usage. The period of twenty years has been adopted by the courts in analogy to the statute limiting an entry into lands; but, as the statute does not apply to incorporeal rights, the adverse user is not regarded as a legal bar, but only as a ground for presuming a right either by grant or in some other form": Parker v. Foote, 19 Wend. *312; and see Edson v. Munsell, 10 Allen, 568.

In California the general statute of limitations for actions concerning real property is five years. We are not at present prepared to say that the presumption of a grant would usually be raised after so short a period in cases where the statute did not apply. It is not necessary to express an opinion upon that point, and we express none. But the fact that the period of the statute of limitations has been shortened is not ground for lengthening the period usually accepted in other states as sufficient to raise the presumption of a grant; nor is the fact that the country is comparatively new, and titles correspondingly unstable, a reason for dispensing with safeguards preserved in older communities. We think, therefore, that uninterrupted possession of land for twenty years or thereabouts, under proper conditions, is sufficient to raise a presumption of a grant, where that is required to make out the occupant's title.

The undisputed facts bring the case within this principle. Peter Mathews took possession of the property in 1861, and he and his successors in interest continued in the open and notorious possession, exercising acts of ownership and control, until the ouster by the defendant in 1881, a period of about twenty years. During the time of his possession Peter Mathews claimed the property as his own. He regularly and annually cultivated it, raising the usual crops for his own use and benefit, and paid all the taxes: See, in this regard, 120 U. S. 553–555, 30 L. Ed. 765, 7 Sup. Ct. Rep. 677, 678. After eleven years he sold and conveyed to others, who in turn took and kept possession, improved the property by laying it out in lots, opening streets, planting trees, etc., and paid all the taxes. After five years they conveyed the property to the plaintiff's testator, who continued in possession, exercising

acts of ownership and control, until he was ousted by the defendant, in 1881. During all this time John Mathews knew of the condition of affairs. He knew of Peter's possession. He knew that Peter had sold and conveyed the land to others. And he knew that the grantees were in possession, and improving the property. But he made no claim to it. He saw what was going on without one word of protest, or any sign of dissent, until about the time that he ascertained that there was no deed of record. These circumstances seem to us to be sufficient to raise the presumption of title in Peter; and in addition it is to be remembered that at the time of the trial the mouths of both brothers were closed by death.

It is quite true that the presumption is rebuttable. But we see nothing in the record which rebuts it. The fact that Peter originally entered under a verbal agreement of purchase from John does not make against it: See 120 U. S. 545, 546, 30 L. Ed. 762, 7 Sup. Ct. Rep. 673. In view of the other facts, it increases the probability that a deed was subsequently made. Nor does the fact that there was no record of such a deed overcome the presumption. Aside from other reasons, it was in evidence that at the time in question "it was a very common thing to find some deed, in a deraignment of title, not recorded. People were very careless, and they had been prior to that, about recording their deeds." Nor do we see anything in the circumstances adverted to by the appellant's counsel which overcomes the presumption.

4. The defendant was not a bona fide purchaser for value. Counsel do not lay stress upon this aspect of the case; and we deem it sufficient to say in the first place that the defense is not set up in the answer: Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 641. The answer denies notice, but it does not assert, either affirmatively or negatively, that the defendant was a purchaser for value. Nor is there any evidence (other than the presumption of consideration from the writing) that he paid anything for the deed. In the next place, he admits that he knew that his grantor was not in possession, and that he knew that Peter had conveyed the property as if it was his own. These circumstances were sufficient to put him on inquiry. Yet he says in his evidence: "I did not go to see the people who were occupying the ground before the deed was made to me by John Mathews, nor did I ask them any

questions"; and further on he says: "I didn't go and ask Mrs. Mathews before I took my deed, because I was not in that locality." And, what is more remarkable, he does not say that he inquired about the existence of the deed from the only person then living who must have known about the fact, viz., his own father in law, John Mathews himself. Even after the execution of the deed, and when, according to his own account, "it was dinned into my ears that there was a deed—that John Mathews had made a deed to Peter Mathews"—although he went to Peter's widow about it, and had the records carefully searched, he does not say that he asked the only man who could give him the information he wanted. The other points made do not require special notice. We therefore advise that the judgment be modified by striking out the part relating to the recovery of possession by the plaintiff, and that, as modified, it and the order denying a new trial stand affirmed, without costs of appeal to either party.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is modified by striking out the part relating to the recovery of the possession by the plaintiff, and that as modified it and the order denying a new trial stand affirmed, without costs of appeal to either party.

HIMMELMAN v. HENRY et al.

No. 11,659; May 21, 1889.

21 Pac. 731.

Appeal.—A Judgment will not be Reversed for the want of a finding on an issue with respect to which there was no evidence; and on appeal on the judgment-roll alone it will not be presumed, against the correctness of the judgment, that there was evidence on a point as to which there was no finding.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Ejectment by Catherine Himmelman against Bridget Henry and others. Defendants appeal.

Langhorne & Miller for appellants; J. M. Seawell and J. B. Reinstein for respondent.

McFARLAND, J.—This is an action of ejectment. The answers, in addition to general denials, set up certain alleged special defenses. The court, trying the case without a jury, found that the plaintiff was the owner and seised in fee, and entitled to the possession, of the premises in suit, and that defendants ousted plaintiff therefrom, and wrongfully and unlawfully withhold possession thereof; but there is no finding as to the alleged special defenses. Judgment went for plaintiff, and defendants appeal from the judgment upon the judgment-roll alone.

Appellants' main contention is that the judgment should be reversed because there is no finding on all the issues raised or alleged to have been raised by the pleadings. But a judgment will not be reversed for want of a finding on an issue with respect to which there is no evidence. In Wise v. Burton, 73 Cal. 175, 14 Pac. 683, this court say: "This court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue." In the case at bar—which is brought here upon the judgment-roll alone—we will not presume, against the correctness of the judgment, that there was evidence upon a point with respect to which there is no finding. This view of the case makes it unnecessary to consider the question whether or not the alleged special issues were material. We think the findings support the judgment. Judgment affirmed.

We concur: Thornton, J.; Sharpstein, J.

RAZZO v. VARNI et al.*

No. 11,558; May 28, 1889.

21 Pac. 762.

Trespass—Pleading—Misjoinder.—A Complaint in Trespass, alleging that defendants entered plaintiff's close, and diverted the waters of his well, and frightened his wife, is not objectionable as presenting a misjoinder of causes of action.

Trespass—Pleading Justification.—In such action, where plaintiff shows peaceable possession under a paper title for several years, if defendants have any right of entry, it must be pleaded in justification.

Trespass — Damages — Evidence.—In such case, evidence by plaintiff that his loss was $4 per day, estimated on the loss of profits on his crop of vegetables, is incompetent, as being the conclusion of the witness, and not the facts on which an estimate could be made.

Trespass — Special Damages—Pleading.—Such damages were special, and, if recoverable at all, must be pleaded.

APPEAL from Superior Court, City and County of San Francisco; J. F. Sullivan, Judge.

C. Razzo sued N. Varni and others for trespass. His complaint alleged an entry on his close, which was then "the property of, and in the quiet and peaceable possession of, said plaintiff, and then and there, willfully, unlawfully and maliciously, and with force and arms, broke and dug up said close and the soil, earth, and ground of said close, and made a large, long, and deep ditch in said close, and diverted the waters from a certain spring on said close, and converted and appropriated the waters of said spring to their (said defendants) own use, said spring and the waters thereof being then the property of plaintiff; and broke and destroyed a large quantity of rushes then and there growing on said soil, and the property of plaintiff; and frightened and terrorized Catarina Razzo, the wife of plaintiff, whereby she became sick and was injured; and then and there disturbed the plaintiff in the use, possession, and occupation of said close, and

*For subsequent opinion in bank, see 81 Cal. 281, 22 Pac. 848.

prevented him from enjoying the same, as he otherwise would have done; whereby said plaintiff has been injured and damaged in his said close, and in said soil and rushes, and said spring, and the waters thereof, and in the use and enjoyment thereof, and by reason of all which premises aforesaid, said plaintiff is injured and has sustained damages in the sum of $5,000." Judgment for plaintiff, and defendants appeal.

M. C. Hassett and Winans & Belknap (J. B. Hannon of counsel) for appellants; T. C. Coogan for respondent.

HAYNE, C.—Action for a malicious trespass in entering with force the plaintiff's close, and diverting the waters of a certain spring. Verdict and judgment for plaintiff. Defendants appeal.

We do not think that the complaint was ambiguous, or that there was any misjoinder of causes of action. The circumstances adverted to by counsel were matters of aggravation, and the defendants must be held to have had no right to enter the close, for the plaintiff proved a peaceable possession under a paper title for several years; and, if defendants had any right of entry for any purpose, they should have pleaded it in justification, which was not done.

But we think there was error in the admission of evidence upon the question of damages. Conceding that where a trespass is malicious or accompanied with circumstances of oppression the damages may be exemplary, nevertheless some of the evidence was not admissible. The plaintiff was called as a witness, and was asked: "What do you estimate your damages per day from your loss of water from that spring?" and was allowed to answer that he estimated his damages at about $4 per day. It is apparent from the use of the words "per day" that the question called for some continuing damages supposed to result from the trespass. And it is clear from the testimony of the witness that he was speaking of the profits which he thought he would have made from the sale of vegetables which he was of opinion he could have raised upon his land had his supply of water not been lessened by the acts of the defendants. His business was "that of gardener—furnishing vegetables to the city markets"; and

he says: "Before defendants dug the ditch I grew nice vegetables. Now I have poor vegetables; not worth anything. My garden used to bring me in twice as much as it does now. I raised twice as many vegetables, for then I could irrigate it; but since the ditch was dug I could not." Assuming, as counsel have assumed, that such damages are not too remote and speculative, we think that the question was improper for two reasons: In the first place, it called for a mere conclusion of the witness, and not for facts upon which any rational estimate could be made; and in the second place, the damages, if recoverable at all, were special, and were not pleaded. The rule that special damages must be pleaded is well settled: Potter v. Froment, 47 Cal. 166; Nunan v. San Francisco, 38 Cal. 690; Gay v. Winter, 34 Cal. 162; Stevenson v. Smith, 28 Cal. 103, 87 Am. Dec. 107. There was scarcely any other evidence of pecuniary damage, and we cannot say that the jury did not base their verdict upon this evidence. We therefore advise that the judgment and order appealed from be reversed and the cause remanded for a new trial.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

MILLARD v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.*

No. 11,716; May 30, 1889.

21 Pac. 825.

New Trial—Insufficient Findings of Jury.—A new trial must be granted where the findings of the jury do not determine all the material issues made by the pleadings.

New Trial—Motion, What Should Set Forth.—Under Code of Civil Procedure of California, section 659, relating to motions for new trial and their contents, it is not necessary, in a motion for new trial for failure to pass on all such issues, to set out in the statement such failure as a ground for the motion.

*For subsequent opinion in bank, see 81 Cal. 340, 22 Pac. 864.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

R. B. Mitchell for appellant; Manuel Eyre for appellee.

BELCHER, C. C.—This is an appeal from an order granting the defendant a new trial. The action was brought to recover the amount of a benefit certificate issued by defendant, and judgment was rendered in favor of plaintiff for the amount sued for. It does not appear from the record upon what ground the new trial was granted, but counsel for respondent prints in his brief what purports to be the opinion of the learned judge who made the order, and from that it appears that the motion was granted upon the ground that there were no findings upon some of the material issues raised by the pleadings. Assuming that the motion was granted upon the ground stated, the question is, Was the ruling erroneous? It is argued for appellant that the findings did cover all the material issues, and that, at any rate, a new trial should not have been granted, because it does not appear that the failure to make full findings, if there were such failure; was prejudicial to the losing party, and because there was no specification of the failure in the statement as a ground for the motion. It has been held by this court that a judgment based upon findings which do not determine all the issues raised by the pleadings is a decision against law, for which a new trial may be had: Knight v. Roche, 56 Cal. 15; Brown v. Burbank, 59 Cal. 535. And in such case the statute does not require the moving party to specify in his statement the failure as a ground for his motion: Code Civ. Proc., sec. 659. After carefully reading the record, we think it clear that the findings did not cover all the material issues raised in the case, and we cannot say, as claimed by appellant, that the judgment would have been the same if the omitted findings had been made in favor of defendant, and that defendant was therefore in no way prejudiced by the failure. The rule is that every error is presumed to work injury to the losing party, unless the contrary clearly appears, and the burden is upon the winning side to show that no injury could have resulted. The cases cited by appellant do

not meet the case in hand. The above disposes of the appeal. Counsel have discussed the whole case in their briefs, but we are not called upon to follow them and thus determine what the judgment should be in advance of the new trial. We advise that the order appealed from be affirmed.

We concur: Foote, C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

McGRATH et al. v. HYDE.*

No. 11,666; June 14, 1889.

21 Pac. 948.

Deed—Delivery by Husband to Wife.—A husband signed and acknowledged a deed conveying land to his wife, stating to the notary before whom he acknowledged it that he wished to give the property to her. The wife testified that her husband put the deed on the table, told her what it was, and directed her to put it away, saying that it could be recorded at any time. She stated that she put the deed in the trunk, and at another time said that her husband did so. Their daughter corroborated her mother, and stated that her father said he would put it away for her mother, and that she could record it any time. An inmate of the house stated that she was in position to have heard any such conversation, if it had occurred, but that she neither saw nor heard anything of the deed, but her testimony was vague as to the continuousness of her presence. Held, that the deed was delivered.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by Honora McGrath and James McGrath, her husband, to cancel a deed made by Michael Hyde to Ellen Hyde, his wife, the female plaintiff being the daughter and heir of Michael Hyde, who died after the deed was made. Judgment for plaintiffs, and defendant appeals.

*For subsequent opinion in bank, see 81 Cal. 38, 22 Pac. 293.

E. B. Holladay and S. W. Holladay (Craig & Meredith of counsel) for appellant; M. Cooney for respondents.

HAYNE, C.—This was a suit to cancel a deed from a husband to his wife, upon the grounds that the grantor had not sufficient capacity to make it, and that it was not delivered. The trial court found that the grantor had capacity to make it, but that it was not delivered, and rendered judgment for the plaintiffs. The defendant appeals. We think that the finding that the deed was not delivered is not sustained by the evidence. The notary who drew the deed testified that he did so at the request of the grantor, without the intervention of any other party; that the grantor instructed him to draw the deed, and signed and acknowledged it before him, stating at the time that "he wished to give the property to his wife." The wife testifies that her husband came home one day, when the following occurred: "He puts a deed on the table, and I says to him, 'What is this?' and he says, 'It is a deed to you.' He says: 'Deeding the West Mission street property all to you—especially to you.' So I picked it up, and I looked at the date, and I began to cry. I thought then sure he was going to die, because he deeded the property to me, and I called Mary's attention at the same time, and I said: 'Here, Mamie, look at this'; and then he says: 'It is not recorded, but it will do,' he says, 'any time, and say nothing now,' he said, 'but just put it away.'" The daughter testifies as follows: "I just came home from town, and father and mother were sitting at the table, and this was before them, and my mother was in tears, and I asked her what was the matter, and she said that father was just after deeding the property to her, and with that my father got up, and walked away, and I said: 'What of it?' Well, she said: 'Oh, he is going to die'; and I said: 'No; that is no reason he is going to die; it is best he should do it now.' Question. What was the position of the deed? Answer. It was lying on the table between them. Q. Did your father say anything? A. He said, after we had got through talking, he said: 'Give it to me, and I will put it in the trunk, and there is no need of recording it until afterward'; and he said: 'You can have it recorded at any time.'" The memory of the mother was at fault as to who put the deed in the trunk. In one place she

says that she did, and in another place that her husband did. The daughter says that her father put it in the trunk, and we assume that such was the fact. The only evidence against this was the testimony of one Maggie Murphy, who lived in the house, and testified that she saw the parties "every day at that time," and was in a position to hear if there had been much conversation, and that she neither saw nor heard anything of the deed at the time. But the testimony of this witness is so vague as to the continuousness of her presence, and as to why she "was in a position" to hear and see, that we think it amounts to nothing. From the whole testimony, we think that it appears without substantial conflict that the husband instructed the notary to draw the deed, signed and acknowledged it, stating that he intended to give the property to his wife; went home and threw it on the table, saying, in substance: "There is a deed of that property to you; put it away"; that the wife took it up, and looked at it, and, after some conversation to the effect that it was not necessary to have it recorded then, the husband put it away in his trunk. It further appears that the husband did not want it recorded then, alleging as a reason that he wished to make some improvements on the property, which we think shows nothing more than that he wished to appear to be still the owner of the property, so far as outsiders were concerned.

We think that this shows a delivery of the deed. Delivery is a question of intention: Hibberd v. Smith, 67 Cal. 554, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46. The term signifies any manifestation whereby the grantor makes known his intention that the deed is complete and is to take effect. It is not necessary that there should be any actual manual transfer of the instrument. In Touchstone it is said: "Delivery is either actual, i. e., by doing something and saying nothing, or else verbal, i. e., by saying something and doing nothing, or it may be both; and either of these may make a good delivery and a perfect deed": 1 Shep. Touch. *57. And it is well settled that no particular form of words is necessary to manifest the intention. In the language of Ryan, C. J., in Bogie v. Bogie, 35 Wis. 667, "there is no set ritual of delivery; that when a deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered; and that such meeting of minds

may be gathered from acts or signs, words or silence, in multitudinous variety of circumstances." Now, we think that if, after throwing the deed on the table, and saying to the grantee, "There is a deed of the West Mission street property to you; put it away," the grantor had done nothing further, but had left the paper there, it would have been entirely clear that there was a perfect delivery: Shelton's Case, Cro. Eliz. 7; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) *255. Was this manifestation of intention, which was complete and sufficient of itself, overcome by the fact that the grantor took the deed and put it in his trunk? We think not. The retention of the deed by the grantor is not conclusive. There may be a good delivery, although the grantor has never parted with the possession of the instrument: Hastings v. Vaughn, 5 Cal. 318; Ruckman v. Ruckman, 32 N. J. Eq. 261; Otis v. Spencer, 102 Ill. 627, 628, 40 Am. Rep. 617; Newton v. Bealer, 41 Iowa, 334; Scrugham v. Wood, 15 Wend. (N. Y.) 546, 30 Am. Dec. 75; Bunn v. Winthrop, 1 Johns. Ch. *336; Souverbye v. Arden, 1 Johns. Ch. *240; Garnons v. Knight, 5 Barn. & C. 692; 4 Kent Comm. 455. The case of Folly v. Vantuyl, 9 N. J. L. 153, is very like the present. There the obligor executed a bond, and, holding it in his hand, said to the obligee: "Here is your deed; what shall I do with it?" and added: "I will take care of it for you"; and had put it in his trunk. Held, a sufficient delivery: See, also, Otis v. Spencer, 102 Ill. 622, 40 Am. Rep. 617. In addition to the above it is to be remembered that in cases of a family settlement like the present the law presumes more in favor of delivery than in other cases: Bryan v. Wash, 2 Gilm. (Ill.) 568; Reed v. Douthit, 62 Ill. 352. Taking all the circumstances together, we think that the intention to pass the title was complete and that the retention of the deed by the grantor was merely for its safekeeping, which, considering the relation of the parties, was quite natural and proper. The other matters do not require special notice. We therefore advise that the judgment be reversed and the cause remanded for a new trial.

We concur: Foote, C.; Gibson, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and cause remanded for a new trial.

PEOPLE v. O'LEARY.*

No. 20,358; June 26, 1888.

22 Pac. 24.

Criminal Law—Pleas—Former Jeopardy.—Penal Code, section 1017, provides that pleas must be oral, and entered upon the minutes in substantially the following form, if defendant plead a former conviction or acquittal: "The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of," specifying the time, place, and court. If he plead once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged," specifying the time, place, and court. Defendant's pleas, as entered on the minutes (though his counsel offered written pleas which were much fuller), were: "First, defendant pleads not guilty of the offense charged; second, a former acquittal; third, once in jeopardy." Held, that the two latter pleas were insufficient.

Criminal Law—Motion in Arrest—Bill of Exceptions.—Under Penal Code, section 1185, providing that a motion in arrest of judgment may be "founded on any defects in the indictment or information mentioned in section 1004," a bill of exceptions, prepared for and used only upon a motion in arrest, cannot properly contain a written plea offered by defendant; and the contents of such writing cannot be looked to in this court to aid the pleas actually entered on the minutes.

Criminal Law—Allowance of Demurrer—Bar to Prosecution.—Under Penal Code, section 1008, providing that the allowance of a demurrer to an indictment or information is a bar to another prosecution, unless the court, "being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, ... directs a new information to be filed," it is not necessary that the court actually render such opinion; it is sufficient if the court directs the district attorney to file a new information.

APPEAL from Superior Court, Yolo County; C. H. Garoutte, Judge.

Information against Arthur O'Leary for practicing medicine without a certificate. Defendant was convicted. The opinion of the commissioners is reported in 16 Pac. 884. Penal Code, section 1008, provides that, "if the demurrer

*For former opinion, see 77 Cal. 30, 18 Pac. 856.

is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed. . . . . "

R. Clark for appellant; Geo. A. Johnson, attorney general, for the people.

PATERSON, J.—The defendant was charged in the information with having practiced medicine without having first obtained a certificate authorizing him to do so as required by the "Act to regulate the practice of medicine in the state of California": Deering's Penal Code, 625–629. The language of the information is sufficiently full and explicit in charging the offense, and we think that the court did not err in overruling the demurrer. The appeal is from the judgment only. The bill of exceptions contains none of the evidence. We cannot say, therefore, that the court erred in refusing certain instructions referred to in appellant's brief. In the former decision filed herein (16 Pac. 884) it was held that "the pleas of former acquittal and once in jeopardy, as the defendant asked to have them entered, were in substantially the form required by the code." In support of this proposition, there was quoted in the opinion a portion of the contents of a written plea offered by defendant's counsel, and it was said: "If the clerk failed to make the entry as fully as he ought to have done, the defendant cannot be made to suffer for that failure." The pleas actually entered upon the minutes of the court were as follows: "First, defendant pleads not guilty of the offense charged; second, a former acquittal; third, once in jeopardy." The jury found the defendant guilty, but did not find on the issues of former acquittal and once in jeopardy. The pleas, as entered upon the minutes, were insufficient. Section 1017, Penal Code, prescribes the form for such pleas. If the defendant plead a former conviction or acquittal the form is as follows: "The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of ——, [naming it], rendered at ——, [naming the place], on the —— day of ————." If he plead once

in jeopardy, the form is as follows: "The defendant pleads that he has been once in jeopardy for the offense charged, [specifying the time, place, and court.]" The object of these forms is plain. The people should be informed of the circumstances as to time, place and court. None of these circumstances are named in the plea actually entered upon the minutes of the court below; and we cannot resort to the written document, which, it is claimed, was filed at the time the plea was entered in aid of the plea actually entered. Section 1017, supra, provides that "every plea must be oral, and entered upon the minutes of the court in substantially the following form: . . . ." The bill of exceptions in the record before us was prepared for and used only upon the motion in arrest of judgment. The bill of exceptions does not purport to be a bill prepared to present exceptions to the rulings of the court, upon any other matter than that of the motion in arrest of judgment. The written plea referred to is not properly in the bill of exceptions. Section 1185, Id., prescribes the grounds upon which a motion in arrest of judgment may be made. It is "founded on any defects in the indictment or information mentioned in section 1004."

There was no error in the ruling of the court below upon the defendant's motion in arrest of judgment, and, the pleas referred to not being in the form required by the code, it was not necessary for the jury to find on them.

We see no merit in the contention that the defendant should have been discharged from custody because the court below failed to render an opinion that the objection to the information to which the demurrer had been sustained could be overcome by filing another. The court directed the district attorney to file a new information, and this was a sufficient compliance with section 1008 of the Penal Code. It was not said in People v. Jordan, 63 Cal. 219, that the court must, in addition to directing the district attorney to file a new information, render an opinion that the objection to the information could be overcome by filing another. Judgment and order affirmed.

We concur: Searls, C. J.; McFarland, J.; Thornton, J.

KNOCK v. BUNNELL.

No. 12,469; July 1, 1889.

21 Pac. 961.

Homestead Declaration — Estimate of Value.—Where a homestead declaration contains no estimate of the cash value of the property, as required by Civil Code of California, section 1263, it is void.[1]

APPEAL from Superior Court, Lassen County; M. Marsteller, Judge.

Spencer & Raker for appellant; Goodwin & Dodge for respondent.

HAYNE, C.—The transcript in this case is improperly entitled: Simpson v. Applegate, 75 Cal. 345, 17 Pac. 237. The action was brought to foreclose a mortgage executed by one H. C. Stockton, since deceased. No claim was presented to the administrator, the plaintiff having waived in his complaint all recourse against any property of the estate other than the mortgaged property. Judgment passed for the plaintiff, and the defendant appeals. The main ground relied upon for the reversal is that a homestead existed upon the property, and that, therefore, a claim should have been presented under the rule of Camp v. Grider, 62 Cal. 20. It is sufficient answer to this contention to say that no homestead existed upon the property. The homestead declaration set out in the answer and introduced in evidence contains no estimate of the cash value of the property, as required by section 1263 of the Civil Code. It was therefore void: Ashley v. Olmstead, 54 Cal. 616; Ames v. Eldred, 55 Cal. 136. In this view the evidence introduced for the purpose of showing that the homestead had ceased to exist was irrelevant and immaterial, and, if it be assumed that there was error in its admission, such error was without injury. The other matters do not require special

[1] Cited in Bunnel v. Stockton, 83 Cal. 320, 23 Pac. 302, as having been heard in the first instance under a misapprehension of the statutory requirement prevailing at the time the homestead was declared, the same in fact, not requiring a statement of value.

notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: Gibson, C.; Foote, C.

PER CURIAM.—For the reason given in the foregoing opinion the judgment and order denying a new trial are affirmed.

PURDY v. RAHL.

No. 11,921; July 1, 1889.

21 Pac. 971.

Appeal—Failure to File Briefs.—Where appellant, long after the time granted by the court to file briefs, fails to file either briefs, points, or authorities, the judgment appealed from will be affirmed.

APPEAL from Superior Court, Santa Clara County; F. E. Spencer, Judge.

T. H. Laine for appellant; J. E. Richards for respondent.

VANCLIEF, C.—On the twenty-fourth day of January, 1889, it was ordered by the court that in this cause appellant be allowed thirty days to file brief, respondent ten days to answer, and appellant five days to reply; and on the twenty-fifth day of March following the court ordered the submission of the cause. But no brief or points and authorities have been filed by either party. We therefore advise that the judgment and order appealed from be affirmed.

We concur: Foote, C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

CASTAGNINO v. BALLETTA et al.*

No. 11,713; July 1, 1889.

21 Pac. 1097.

Building Contract.—Assumpsit will Lie to Recover a balance due on a special contract to erect a building, and it is not necessary to allege the performance of all the conditions to be performed before payment was due.

Appeal—Conflicting Evidence.—The Verdict of the Jury will not be disturbed because the evidence is conflicting.

Trial.—Instructions are Properly Refused when the charge of the court covers all the points in the case, including those found in the instructions requested.

Law of Case.—Where, After the Reversal of a Judgment in a mechanic's lien suit, the case is remanded for a new trial, and the plaintiff amends his complaint and sues in assumpsit, the law of the decision on the appeal is no longer the law applicable to the pleadings.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Tilden & Tilden for appellants; Hassett & Tevlin and Theodore Bradley for respondent.

BELCHER, C. C.—This action was originally brought to foreclose a mechanic's lien for $1,395.50 on a block of buildings in the city of San Francisco. The buildings were erected by plaintiff for defendants under a written contract, which provided that plaintiff should furnish all the materials, and do the work according to plans and specifications made by George Bordwell, architect, and receive therefor the sum of $9,800, payable in installments as the work progressed, the last payment to be made "when the houses shall be completed, each in all its parts, and accepted by the architect." The $1,395.50, consisted of an unpaid balance of the contract price and $375 alleged to be due for extra work and materials. The case was tried, and judgment rendered for plaintiff. An ap-

*For subsequent opinion in bank, see 82 Cal. 250, 23 Pac. 127.

peal was taken by defendants from the judgment and an order denying them a new trial, and the judgment and order were reversed on the authority of Loup v. Railroad Co., 63 Cal. 97. The case came on again for trial, and the plaintiff was allowed, over the objections of defendants, to file an amended complaint in indebitatus assumpsit. It contained three counts. The first alleged an indebtedness from defendants to plaintiff of $1,020.50 for work and labor done and material furnished in the erection of a block of buildings in the city of San Francisco. The second alleged an indebtedness of $270 for extra work done and materials furnished in the erection of the said block of buildings. And the third alleged an indebtedness of $105, for putting a door in defendants' building, and constructing a sidewalk in front thereof, at their special instance and request. The prayer was for judgment for $1,395.50, the aggregate of these amounts, with interest and costs.

The defendants, by their answer, denied that they were indebted to plaintiff in the sums of money named in the complaint, or in any sums or sum whatever, and to the first two counts they pleaded the statute of limitations. They then alleged that the labor and materials sued for, except the last item of $105, were executed under a written contract, which was furnished by the parties on the 26th of April, 1876, and a copy of which was set forth and made a part of the answer. They further alleged that they complied with all the conditions of the contract on their part, and paid plaintiff during the progress of the work the sum of $9,104, but that plaintiff failed to comply with the conditions of the contract on his part; that he omitted to put in the buildings many things required by the contract and specifications, and that the value of the articles and work omitted was $450; that the buildings were not completed within the time named in the contract, and defendants were damaged thereby in the sum of $900; that the foundation was not put down to solid ground, and by reason thereof the buildings settled, to the damage of the same in the sum of over $1,000. The prayer was for judgment against the plaintiff for $1,500 and costs of suit. The case was tried before a jury, and the verdict and judgment were

for plaintiff. Defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

When the trial commenced, the plaintiff first introduced in evidence the building contract, a copy of which is set out in the answer, and the specifications referred to therein. He then introduced evidence showing that the terms of the contract were subsequently changed in certain respects by agreement of the parties; that he proceeded to construct and complete the buildings according to the plans and specifications; that he performed certain extra work, which was provided for by an indorsement on the contract, and for which he was to receive $270; that he also placed an extra door in one of the houses by direction of the architect at a cost of $15, and by an agreement with defendants laid a new sidewalk in front of the building, for which they were to pay him $90; that he was prevented by defendants from completing the whole work at the time named in the contract; that after it was in fact completed the architect suggested certain items of work which he wished to have done, saying that when they were done to his satisfaction he would accept the buildings as complete, and that he (plaintiff) did the suggested work, so far as it was called for by the contract; that a few days afterward, at a meeting of the plaintiff, defendant Balletta, and the architect, the architect said he was satisfied with the building, and would accept it; that at this meeting the architect also said to plaintiff's attorney, who was present, that "he [plaintiff] had a hard contract anyhow, and that he was glad that he had finished it up, and that he had advised him not to take the contract in the first place; that he knew he lost a great deal of money on it; he said he knew he lost not less than $2,000 on the contract; he was glad it was finished"; that it was then arranged that another meeting of the parties should be held at the architect's office to figure up the amount due plaintiff, and settle the whole matter; and that in pursuance of this arrangement the parties met, the amount due plaintiff was figured up and agreed to be, including the extra work, $1,395.50; and that after that the architect called plaintiff's attorney aside, "and spoke in a low tone, and said that he wanted plaintiff to pay him $100; that he had been to a great deal of trouble in superintending

the buildings, and that the amount paid him by defendant for his services was not sufficient"; that plaintiff, on being informed of this demand, refused to pay it, and the architect then said that he would charge plaintiff for lost time, and would not receive the buildings; that defendant was present, with a bag of money on the table, ready to pay plaintiff, if the architect had not stopped him from doing so. The defendants objected to the admission in evidence of the contract and specifications, on the ground that they showed an entirely different contract from the one set up in the complaint, and were therefore irrelevant and immaterial; and to all the evidence showing that the terms of the contract were varied and changed, and to all evidence offered to excuse or explain the delay in the completion of the contract according to its terms, on the ground that it was incompetent, and inadmissible under the pleadings. They also move for a nonsuit on similar grounds. The objections and motion were all overruled, and exceptions reserved.

1. The first and most important question presented relates to the amended complaint, and the plaintiff's right to obtain relief thereunder. It is contended for appellants that an action in general assumpsit will only lie where nothing remains to be done except to ascertain and determine the amount of money due the plaintiff, and that where, as in this case, the action is based on a special contract, the plaintiff must allege and prove the performance of all conditions precedent before he can recover. And it is said that all the conditions precedent were not performed here, because, under the contract, the last payment was not to be due until the buildings should be completed and accepted by the architect. It has been frequently held in this state that, notwithstanding the requirement that the facts constituting the cause of action should be stated in ordinary and concise language, the common counts may be used: Freeborn v. Glazer, 10 Cal. 337; Wilkins v. Stidger, 22 Cal. 235, 83 Am. Dec. 64; Abadie v. Carrillo, 32 Cal. 172; Friermuth v. Friermuth, 46 Cal. 42; Magee v. Kast, 49 Cal. 141. In De Boom v. Priestly, 1 Cal. 206, there was a special contract for the erection of a building, which was deviated from by instructions from the defendants. The action was brought on a quantum meruit, and testimony was admitted of

the value of plaintiff's services. The court refused to instruct the jury, at the request of defendants, that, "if the jury believes that there was a special contract between the parties to erect the buildings at a specified price, and according to an agreed plan, which was afterward changed by consent, the plaintiffs are compelled to sue upon that special contract, so far as it can be traced, and cannot recover upon an implied contract for work and labor, or for materials." And it was held that the evidence was properly admitted, and the instruction refused. In Reynolds v. Jourdan, 6 Cal. 108, the plaintiffs brought an action of assumpsit for work and labor done and materials furnished in the erection of a building for defendant. In his answer the defendant set up a written contract for the erection of the building, and on the trial the plaintiffs offered the contract in evidence, and it was admitted over the objection of defendant. The court said: "When the entire performance of a special contract has been prevented by one of the parties, or where its terms have been afterward varied by the agreement of both parties, the action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon the contract. In such case the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion." In Farron v. Sherwood, 17 N. Y. 227, it was held that the code had not changed the former rules of pleading, and that a party who had wholly performed a special contract on his part may still count on the implied assumpsit to pay the stipulated price, and is not bound to declare specially on the agreement. And the doctrine of that case has been affirmed in other cases: See Hosley v. Black, 28 N. Y. 438; Hurst v. Litchfield, 39 N. Y. 377. In Kerstetter v. Raymond, 10 Ind. 199, it was held that the rules of common-law pleading, which permitted evidence of special contracts to be given under the common counts, had not been changed by the code, and that they applied—First, where the whole of the contract has been performed on the part of the plaintiff; second, where the special contract has been altered or deviated from by common consent; third, where the special

contract has been performed in part, and its full performance is prevented or dispensed with by the defendant; and, fourth, where the plaintiff has not fulfilled on his part, but has, under it, done or delivered something of value to the defendant. The case of O'Connor v. Dingley, 26 Cal. 11, cited by appellants, is not in conflict with the foregoing cases. The action was assumpsit, and the evidence showed a special contract whereby the defendant was to pay plaintiff, not in money, but by note. In the opinion, there are some lines of protest against the acceptance of the common counts under our reformed modes of procedure, but the decision was only that the proper action would be one for damages for failure to give the note. In view of the foregoing authorities we think the common counts may be used in a case like this, and that there was no error in the admission of evidence or in the denial of the motion for nonsuit. It is true, it does not appear that there was any formal acceptance of the buildings by the architect. But the plaintiff's evidence shows that they were in fact completed according to the terms of the contract, except as to time, and that the failure to have them done in time was the defendant's fault. It further shows that after they were completed the architect said he was satisfied with them, and would accept them. If, after this, he in bad faith, and for a selfish purpose, changed his mind, and refused to accept them, that fact cannot affect the plaintiff's right to recover.

2. There was evidence introduced by the defendants conflicting on some points with that introduced by the plaintiff. The record, however, shows only a conflict; and, in view of the well-settled rule in such cases, we cannot disturb the verdict on the ground that it was not justified by the evidence.

3. The court refused to give to the jury certain instructions asked by defendants, and then read to them its own charge. The charge covered the whole case, and stated the law applicable thereto very fully, clearly, and, as we think, correctly. It also included all the points found in the instructions refused, which were correct statements of the law, and were applicable to the case. We therefore see no error in the refusal, or in the charge given.

4. It is contended that the decision in Loup v. Railroad Co., supra, on the authority of which the former judgment was reversed, has become the law of this case, and that, under it,

averment and proof that the buildings had been accepted were necessary. It was held in Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065, that the reversal of a judgment and order denying a new trial places the parties in the lower court in the same position as if the case had never been tried, with the exception that the former opinion of the appellate court must be followed, so far as applicable, in the new trial. After the judgment in this case was reversed, the plaintiff amended his complaint, as he had a right to amend it: Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100. The law of the case cited was, therefore, no longer applicable to the pleadings. On the new trial the court seems to have followed and was governed by the "law of the case" in the admission of evidence as to performance, waiver, refusal, etc., and in its instructions to the jury respecting them.

5. No point is made by counsel on the statute of limitations, and we therefore find it unnecessary to consider the question as to whether the action was barred or not. Looking at the whole record, we find nothing calling for a reversal, and therefore advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Gibson, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

MOYLE et al. v. LANDERS et al.*

No. 11,906; July 1, 1889.

21 Pac. 1133.

Corporations—Misappropriation—Suit by Stockholders.—A suit to procure relief for the misappropriation of the funds of a corporation is properly brought by the stockholders, without any demand on the directors to bring such suit, where the complaint alleges that the corporation is under the control of the defaulting directors, and that such demand would be useless.[1]

*For subsequent opinion in bank, see 83 Cal. 579, 23 Pac. 794.

[1] Cited in the note in 97 Am. St. Rep. 34, on actions by stockholders on behalf of corporations.

Corporations—Stockholders' Suit—Limitation of Actions.—Such a suit is not barred by the statute of limitations where the defaults are said to have occurred between August 1, 1882, and May 1, 1885, and the suit is brought July 1, 1885; Code of Civil Procedure of California, section 338, providing that suits for relief on the ground of fraud shall be brought within three years of the discovery of the fraud.

Pleading.—Where a General Demurrer is Filed to a complaint containing two counts, on the ground that the causes of action are barred by the statute of limitations, the demurrer must be overruled, if a good cause of action is stated in either county.

Stockholders' Suit—Alleging Ownership of Stock.—An averment that the plaintiffs were owners of the stock of the corporation before suit brought, and ever since 1881, sufficiently alleges ownership of the stock.

Stockholders' Suit—Who may Bring.—Such suit may be brought by anyone or any number of stockholders.

Stockholders' Suit — Directors as Parties Defendant.—The directors who are charged with having connived in such defaults are proper parties defendant in such action.

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

Messrs. Moyle and Holling, stockholders in the Andes Silver Mining Company, sued Michael Landers and others, directors of said company, to obtain relief from certain frauds perpetrated by the directors. A demurrer to the complaint was sustained, and plaintiffs appeal.

L. E. Bulkeley for appellants; H. C. Sieberst for respondents.

PER CURIAM.—The complaint contains two counts. The defendants demurred to the whole complaint, and "to the second alleged cause of action set out in the plaintiffs' complaint," which we shall consider as a demurrer to the second count of the complaint.

The demurrer was sustained, and plaintiffs declining to amend, final judgment was given and entered in favor of defendants. From this judgment plaintiffs have appealed.

The object of the action is to procure relief from certain alleged fraudulent misappropriations of the funds and property of the corporation defendant the Andes Silver Mining Company by some of its directors. The defendants contend

that the complaint is defective in this: That the action should have been brought by the corporation as plaintiff, and not by the present plaintiffs, who are stockholders of the corporation. The general rule undoubtedly is that an action of this character must be brought in the name of the corporation. The recovery, if any, belongs to the corporation, and must go into its coffers. But there are exceptions to this rule. One is where a demand is made on the corporation to bring such action, and it refuses to bring it. This demand must be considered and passed on by the managing authority of the corporation, which is its board of directors. But where such a demand would be useless, as where the peccant directors still control the affairs of the corporation, such a demand would be regarded as useless, and will not be insisted on. We think the averments of the complaint show that the corporation is still under the control of the alleged defaulting directors, or their tools and servants, and that it sufficiently appears that a demand to sue would have been nugatory. In such a case the law dispenses with a demand, and allows a stockholder to bring the action to which the corporation, as is here the case, must be a party.

It is contended, further, that the causes of action set forth in the complaint are barred by the statute of limitations, and that such appears on the face of the complaint to be the case. The action is brought for relief on the ground of fraud, in which case the cause of action is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Such is the law of this state fixed by statutory enactment. The action, under such circumstances, is not barred if the discovery of the facts constituting the fraud has been made within three years before the commencement of the action: Code Civ. Proc., sec. 338. Now, it seems to us that the defaults set forth in the second count of the complaint, hereinafter pointed out, were not discovered within three years before action brought.

The defaults referred to are as follows: An overallowance of $3,850 to Michael Landers on account of expenses of trips to Virginia City, Nevada; the transaction with regard to the purchase of furniture of Burnham, for which it is averred $800 was allowed, of which sum only $346.45 was used in the purchase, and the balance was retained by Michael Landers, while the furniture bought was taken by said Landers to his

private residence, and there used by him from the time of the purchase; the misappropriation of funds to pay the assessments on the stock of the directors of the Andes Silver Mining Company; the misappropriation of a portion of the proceeds of the sales of certain shares of the stock of the corporation above named. The above defaults are alleged to have occurred, the first in August and September, 1882, the second on the 1st of August, 1882, the others in December, 1882, August, 1883, and since the 1st of May, 1885. The action is averred to have been commenced on the first day of July, 1885. The above defaults are averred to have been committed and discovered within three years before this date, as will be seen by comparison of the dates above given.

As the demurrer which embraces the first count is a demurrer to the whole complaint, if a good cause of action not barred by the statute of limitations is stated in either count, the demurrer, on the ground above stated, must be overruled; this being in accordance with the long-settled rule that where the demurrer is to the whole complaint it is not well taken, if any count of the complaint is legally sufficient. The averment as to the ownership of the stock is sufficient. The averments are that the plaintiffs, Moyle and Holling, were owners of the stock of the Andes Company above named before the beginning of the action, and have been such owners ever since sometime in the year 1881. We can see no tenable objection to the joinder of Holling with Moyle as plaintiff. Any one or any number of stockholders may unite in bringing such action. In our opinion the directors made defendants are properly made such. They are at any rate proper parties, and, indeed, it is highly proper that they should be made such, as the defaults set forth in the second count of the complaint are alleged to have occurred with their connivance. As to the other defaults set forth in the complaint, and whether or not they are barred by the statute of limitations, we think it proper to say nothing. We have said enough to warrant us in holding that the court below erred in sustaining the demurrer to the complaint, for which reason the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint, and the second count thereof, to permit the defendants to answer, and for further proceedings in accordance with law. So ordered.

HANSON et al. v. VOLL et al.

No. 11,951; July 2, 1889.

21 Pac. 971.

Appeal—Failure to File Briefs.—When a case is submitted, without oral arguments, on briefs to be filed, and none are filed, the judgment will be affirmed without looking into the record.

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

David McClure for appellants; William H. Fifield for respondents.

BELCHER, C. C.—This case was submitted, without oral argument, on briefs to be filed. The time allowed for filing briefs has elapsed, and none have been filed. In such case the rule is well settled that judgment will be affirmed without looking into the record. We therefore advise that the judgment here appealed from be affirmed.

We concur: Hayne, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

Ex Parte STERNES.*

No. 20,480; July 25, 1889.

21 Pac. 1132.

Habeas Corpus—Hearing in Supreme Court.—Petitioner was arrested on the charge of kidnaping, and examined, and committed by the justice. He applied to the supreme court to be released on habeas corpus, pending the decision of which an information was filed against him for the same offense for which he had been committed.

*For opinion in bank, see 82 Cal. 245, 23 Pac. 40.

On the hearing of the habeas corpus before the court in bank (five justices present), evidence offered to show that the commitment was ordered by the justice on no other evidence than that petitioner had arrested a person by virtue of a warrant, and that, therefore, the commitment was "without reasonable or probable cause," was excluded (four justices concurring), on the ground that the filing of the information was conclusive as to probable cause. The case was subsequently submitted on briefs, but when it was taken up for decision it was found that, on account of the retirement of the chief justice, "the concurrence of four justices present at the hearing," required by the constitution of California, article 6, section 2, could not be had, and a rehearing was ordered, and the case resubmitted upon the original briefs. Held, that the ruling excluding the evidence was a final disposition of the question involved, and that petitioner must be remanded.

Habeas corpus.

Charles W. Kitts and A. L. Hart for petitioner; W. D. Long, district attorney (C. W. Cross of counsel), for respondent.

BEATTY, C. J.—This is a proceeding upon habeas corpus. It appears from the petition upon which the order for the issuance of the writ was based that in April, 1888, the petitioner, George H. Sternes, was deputy sheriff of Yuba county; that a warrant for the arrest of one Ah Fong, issued by the superior court of said county, was placed in his hands for service; and that he executed the writ by arresting Ah Fong in Nevada county, and bringing him before the superior court of Yuba county, at Marysville. It is further alleged in the petition that said Ah Fong thereafter procured a warrant to be issued by a justice of the peace in Nevada county, commanding the arrest of petitioner on a charge of kidnaping, and that, being arrested upon such warrant and taken before said justice of the peace, petitioner had an examination, and upon proof of said arrest of Ah Fong under said warrant issued by the superior court of Yuba county, and the delivery of the body of Ah Fong to said court in Marysville, and without other proof of the commission of any offense, said justice made an order holding the petitioner to answer upon said charge of kidnaping, and thereupon committed him to the custody of George Lord, sheriff of Nevada county. This petition was filed September 26, 1888, and on the same day the late chief justice

made an order directing the issuance of the writ of habeas corpus as prayed, returnable before this court on the twenty-second day of October following, and ordered that pending the hearing the petitioner be admitted to bail. On the 22d of October the respondent, Lord, filed his return, showing that the petitioner had been in his custody, and had been confined by him in the county jail of Nevada county, under and by virtue of a commitment for kidnaping, a copy of which is annexed to the return; that after service of the writ of habeas corpus he had discharged the petitioner on bail; and that subsequent thereto, on October 18, 1888, an information had been filed by the district attorney of Nevada county, accusing petitioner of said crime of kidnaping. The court, sitting in bank, five justices present, including the late chief justice, thereupon proceeded with the hearing. It appears from the notes of our official reporter, and statements of members of the court, that counsel for petitioner offered in evidence certified copies of the depositions taken at the examination of petitioner by the committing magistrate, for the purpose of establishing the ground upon which he claimed that his imprisonment was unlawful, viz., that he had been "committed on a criminal charge without reasonable or probable cause": Pen. Code, sec. 1487, subd. 7. To the introduction of this testimony respondent's counsel objected upon the ground that the filing of the information by the district attorney put an end to all inquiry in this proceeding as to the existence of reasonable or probable cause for holding the petitioner to answer. Four of the justices present at the hearing, including the late chief justice, concurred in sustaining this objection. Justice Paterson did not concur in the ruling. But under the decision of the four other justices the testimony was excluded. None of these occurrences at the time of the hearing have been made matter of record, the minutes of the clerk merely showing that the cause was orally argued by counsel for petitioner and for respondent, and submitted upon briefs to be filed. In the printed briefs subsequently filed counsel for petitioner elaborately argue the proposition that if a person has been held to answer on a criminal charge, without reasonable or probable cause, he has an undoubted right to be discharged upon habeas corpus, and that his right to be so discharged cannot be impaired by the subsequent filing of

an information by the district attorney, and more especially where the information is filed after the issuance and service of the writ of habeas corpus. Counsel for respondent in their brief completely ignore the argument made on behalf of petitioner, and rest entirely upon the claim that the whole question was decided and finally disposed of at the hearing. When, however, after the final submission of the cause, it was taken up for decision, it was found that, on account of the retirement of the late chief justice, "the concurrence of the four justices present at the hearing," which is made by the constitution (article 6, section 2) essential to a judgment of this court in bank, could not be obtained, and it became necessary to set aside the previous order of submission and to direct a rehearing. This having been done, counsel have again submitted the case upon the briefs already filed.

From the foregoing statement it will appear that the condition of the cause is decidedly anomalous. It is an original proceeding in this court, and evidence is necessary in support of the allegations of the petition in order to make out the ground upon which the petitioner claims his discharge. The only evidence offered for that purpose at the hearing was by the ruling of a competent number of the sitting justices excluded from consideration. This order did not need to be in writing, like the determination of a cause (Const., art. 6, sec. 2), and seems to have been a final disposition of the question involved. At all events, the case was submitted at the time and has been resubmitted without the evidence upon which alone—conceding the correctness of the proposition so ably argued by his counsel—we could order the petitioner's discharge. For this reason, therefore, and without deciding any other question presented by the record, we feel constrained to remand the prisoner. It is so ordered.

We concur: Works, J.; Sharpstein, J.; Paterson, J.; Fox, J.

SMITH et al. v. IRVING.

No. 11,644; August 30, 1889.

22 Pac. 170.

Limitation of Actions—Mistake.—Under Code of Civil Procedure, section 338, providing that an action for relief on the ground of fraud or mistake must be commenced within three years after the cause of action accrued, such cause of action not to be deemed to have accrued until the discovery of the mistake by the aggrieved party, a complaint for relief on the ground of a mistake which occurred thirty years previous, and which is silent as to the time when such mistake was first discovered, is bad on demurrer.

APPEAL from Superior Court, Alameda County; W. E. Greene, Judge.

Action by James Smith and others against Henry P. Irving. A demurrer to the petition was sustained and plaintiffs appeal. Pending appeal, Henry P. Irving, respondent, died, and William Matthews, his executor, was substituted in his place. Code of Civil Procedure, section 338, prescribes a three years period of limitation for the commencement of "an action for relief on the ground of fraud or mistake; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Mich. Mullany, Aylett R. Cotton and W. H. H. Hart for appellants; George Leviston for respondent.

PER CURIAM.—This is an action for relief on the ground of mistake. It was not commenced until more than thirty years after the mistake occurred. As to the time when the mistake was first discovered by plaintiffs, the complaint is silent. The complaint was demurred to on the ground, among others, that the alleged cause of action was barred by the provisions of section 338 of the Code of Civil Procedure. The demurrer was sustained, plaintiffs declined to amend their complaint, judgment was entered for defendants, and plaintiffs appeal. Section 338 of the Code of Civil Procedure provides

that an action for relief on the ground of fraud or mistake must be commenced within three years after the cause of action accrued. In People v. Blankenship, 52 Cal. 619, it was held that an action for relief on the ground of fraud was barred after the lapse of three years, unless the plaintiff alleged a discovery of the facts constituting the fraud within three years before the commencement of the action. In that case an order overruling a demurrer was reversed. In Sublette v. Tinney, 9 Cal. 423, the court says: "The policy of the law is that actions on this ground should be commenced within three years; but that innocent parties may not suffer whilst in ignorance of their rights, the statute excepts them from the limitation until a discovery of the fraud. The latter clause of the section must, therefore, be construed as an exception, ... and be pleaded as such. In the present case, then, the cause of action accrued upon the execution of the contract." It has always been held that statutes of limitation should be strictly construed. The language of the statute is plain, and we think the demurrer was properly sustained. It is unnecessary to consider the other grounds of demurrer. Judgment affirmed.

Thornton, J., heard the argument, but took no part in the decision of this case, thinking himself disqualified.

PRIET et al. v. DE LA MONTANYA et al.*

No. 11,531; August 30, 1889.

22 Pac. 171.

Treasurer's Bond—Liability of Sureties.—Defendant H. gave a bond as city treasurer for the faithful discharge of official duties then or thereafter imposed on him. As such treasurer he received money arising from the sale of certain street bonds, under Statutes of 1875–76, page 443, authorizing the widening of a certain street, and providing (section 11) that the treasurer "shall receive and safely keep the same as moneys belonging to said city and county are kept," and designating a separate fund therefor. A warrant—No. 92—on an

*For subsequent opinion in bank, see 85 Cal. 148, 24 Pac. 612.

award for damages to a certain lot was issued to one A. as owner, without knowledge of plaintiff's claim of interest therein, but on the discovery of such claim another warrant—No. 114—was issued to the owner or owners of said lot, and notice thereof given to defendant H. The money was illegally paid by defendant's deputy on warrant No. 92; and the fund was sufficient to pay only a part of plaintiff's share under warrant No. 114. Held, that the sureties on the bond were liable for the residue.

Treasurer's Bond.—Where the Evidence Showed That at the End of the official term for which the bond sued on was given the principal had on hand $24,962.91 in the fund, against which there were no legal demands prior to warrant No. 114 for $10,932, a finding that there was a balance of $1,800 in said fund is against the evidence, if it relates to the first term of the treasurer, and if it relates to the end of his second term, it is beyond the issues pleaded.

Treasurer's Bond—Limitation of Actions.—Where plaintiffs, whose cause of action depended on warrant No. 114, payment of which could not be enforced until the conflicting claims between them and the lot owner were finally determined, commenced their action within seven months after such determination, though more than four years after the illegal payment by the treasurer, their right of action was not barred by Code of Civil Procedure, section 337, providing that actions upon any contract, obligation, or liability founded upon an instrument in writing shall be commenced within four years.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by Pierre Priet and others against J. de la Montanya and others on the official bond of Charles Hubert, as treasurer of the city and county of San Francisco, to recover the balance due and unpaid on a warrant held by plaintiffs and drawn by the board of Dupont street commissioners on the "Dupont street fund." Plaintiffs had judgment. Defendants moved for a new trial, which was denied, and from the judgment and order denying their motion they appeal.

Mastick, Belcher & Mastick for appellants; D. H. Whittemore for respondents.

GIBSON, C.—Defendant Hubert was treasurer of the city and county of San Francisco from December 6, 1875, until December 6, 1877, and before entering upon the discharge of his official duties gave the bond in suit, upon which his co-

defendants are sureties. Upon the expiration of his term of office he succeeded himself by re-election.

Under the provisions of an act entitled "An act to authorize the widening of Dupont street, in the city and county of San Francisco," approved March 23, 1876 (Stats. 1875–76, p. 443), he, as such treasurer, received from the sale of Dupont street bonds the sum of $966,950 to the credit of the "Dupont street fund." A lot on Dupont street, belonging to one David Hunter, in which plaintiffs had a leasehold interest, was, pursuant to the act, taken for the improvement of the street, and the board of commissioners awarded the sum of $10,932 as damages for the taking of the lot, to David Hunter, as owner; and on April 20, 1877, issued to him, in his favor, a warrant, numbered 92, for the amount. Hunter, seven days thereafter, indorsed these words: "Received payment, David Hunter," upon the warrant, and delivered it to Henry S. Tibbey, the secretary of the board of commissioners. At the time the warrant was issued, the board was unaware of the interest of plaintiffs in the lot, but subsequently, on July 9, 1877, having discovered plaintiffs' claim of interest therein, it drew another warrant, numbered 114, for the same amount, payable to "the owner or owners" of the lot taken, and in compliance with section 15 of the act of March 23, 1876, deposited the same with the county clerk, and notified defendant Hubert, as treasurer. Both warrants were payable out of the Dupont street fund. The first warrant, No. 92, was afterward illegally presented at the treasurer's office by Tibbey, and illegally paid to him by a deputy of the treasurer. The plaintiffs, in order to have determined the proportion of the amount so awarded that they were entitled to under said section 15 of the act, brought an action against Hubert, as treasurer, T. H. Reynolds, as county clerk, and David Hunter, and prosecuted the same to final judgment, which was entered on the fifth day of January, 1883, in accordance with the decision of this court rendered therein on appeal (Priet v. Hubert, 62 Cal. 9); in which decision it was also determined that the payment of warrant No. 92 was no defense to the payment of warrant No. 114. On the day after judgment was entered, the then treasurer paid on warrant No. 114 the sum of $1,800, being all that remained in the Dupont street fund. The amount was divided pro rata between plaintiffs and Hunter—the former receiving the sum

of $178, and the latter the remainder, leaving the sum of $1,472, with interest thereon, together with $100 as costs in that action, due the plaintiffs, to recover which this action was brought against Hubert and his sureties. Plaintiffs had judgment, from which and an order denying a new trial comes this appeal. Appellants contend (1) that Hubert, under the act of March 23, 1876, was not the agent of the city, but of the state, and consequently his sureties are not liable for any transaction under the act; (2) that the breach of the bond sued on did not occur within the official term for which it was given; (3) that the cause of action is barred by the statute of limitations.

In support of the first point, Liebman v. San Francisco, 11 Saw. 147, 24 Fed. 705, is relied upon. That was an action against the city to recover on certain coupons attached to bonds issued under the act of April 1, 1872 (Stats. 1872, p. 911), authorizing the opening of Montgomery avenue, and is similar in its provisions to the act in question here. The principal question in that case was as to the liability of the city on the bonds. It was held by the court that the board of public works created by the act was not the agent of the city, but of the state, and acted for the state in the performance of the duties imposed by the act, and that the city was not liable. Moreover, the act itself expressly declared that the city and county of San Francisco should not, in any event, be liable upon the bonds. Conceding that the Dupont street act simply made the board of public works or commissioners therein created, together with the treasurer, agents for the state, and not for the city and county, it does not follow that the treasurer would not be liable on his official bond for the loss of funds received under section 11 of the act, which provides that "the money arising from the sale of said bonds shall be paid to the treasurer of said city and county, who shall receive and safely keep the same, as moneys belonging to said city and county are kept; and said funds shall be known and designated as the 'Dupont street fund.'" The general rule regarding sureties on an official bond is that they are only liable for such money as it is the legal duty of their principal to receive by virtue of his office, and must be determined by reference to the statutes making such principal a custodian of public funds: Brandt on Suretyship and Guaranty, sec. 451. The legis-

lature, under the constitution of California of 1849, had plenary power to prescribe the duties of the treasurer of the city and county of San Francisco; and by the consolidation act of April 19, 1856 (Stats. 1856, p. 145, secs. 79, 80, 82), did prescribe that such treasurer should receive, safely keep, and lawfully disburse "all moneys belonging to, or which shall be paid into, the treasury, and shall not . . . . pay out any part of said moneys except upon demands authorized by this act" (section 79). As the act only provides for the payment of demands against the city, it may be said that the statutory direction regarding the receiving, keeping, and paying out moneys applies only to moneys belonging to the city and county. Yet the legislature, having full power to prescribe the duties of the treasurer, could also curtail or enlarge those duties, and at any time within his official term. By the act of March 23, 1876, his duties were increased, and he was thereby charged with the additional duties of receiving and safely keeping all money derived from the sale of Dupont street bonds in the same manner "as moneys belonging to said city and county are kept" (section 11), and of paying out the same in a certain manner. The county treasurers of the state are required to receive, safely keep, and pay out in the prescribed manner all moneys belonging to their several counties, and all other moneys directed by law to be paid into the county treasuries: Pol. Code, secs. 4144, 4161.

A familiar instance of where money other than county funds is directed to be paid to the county treasurer is in the matter of the sale of state school lands. No one would seriously contend that such a legislative direction does not make it obligatory upon the several county treasurers of the state to receive and account for such money to the state, or render their sureties liable. Hubert and his sureties, in compliance with Political Code, sections 954, 960, gave the bond sued on, in view of this power of the legislature, and on the express condition therein that the sureties would answer for any failure on the part of their principal to faithfully discharge all official duties then required of him, as well as such additional duties as might be lawfully imposed upon him. Therefore, whether we regard Hubert as the agent of the state for the discharge of the additional duties imposed by the Dupont

street act or not, the liability of his sureties for the faithful performance thereof remains the same.

Sureties on an official bond are liable only for a breach of official duty committed by their principal during the term of office for which the bond was given (People v. Aikenhead, 5 Cal. 106; Brown v. Lattimore, 17 Cal. 93; Hubert v. Mendheim, 64 Cal. 213, 30 Pac. 633), or committed by him after the expiration of his official term, and before he yields up the office to his successors (Placer Co. v. Dickerson, 45 Cal. 12). The evidence in this case shows without conflict that at the expiration of the official term for which the bond sued on was given, the principal, as treasurer, had on hand, belonging to the Dupont street fund, the sum of $24,962.91, against which no legal demands prior to that evidenced by warrant No. 114 appear. This amount was more than sufficient to meet the payment of warrant No. 114, if it could have been presented for payment during the first official term of Hubert. And as the treasurer had in the fund at the expiration of his first term of office the sum above stated, the court, in finding "that the balance left by said Hubert in the said Dupont street fund was the sum of $1,800," erred in finding against the evidence. If the finding relates to the end of his second term of office, it is beyond the issues tendered by the pleadings, as they only pertain to his first official term.

Considerable evidence was adduced tending to show the misappropriation of portions of the Dupont street fund, notably the illegal payment of warrant No. 92; but, as warrant No. 114 was not payable out of any particular portion of the fund, the misappropriations could not concern plaintiffs as long as there was enough in the fund not subject to prior demands to meet their warrant at any time prior to the expiration of Hubert's first term of office. If the deficiency illegally caused, whereby plaintiffs were prevented from obtaining the full amount of their portion of warrant No. 114, occurred during Hubert's second term of office, the sureties on the bond given for the second term would be responsible: See Heppe v. Johnson, 73 Cal. 270, 14 Pac. 833.

Plaintiffs' cause of action depended on warrant No. 114, issued under the Dupont street act, and payment thereof could not be enforced until the conflicting claims of plaintiffs and Hunter thereto were finally determined, pursuant to sec-

tion 15 of the act, which was not done until the final judgment in Priet v. Hubert was entered on January 5, 1883; and, as this action was commenced on August 2, 1883, it results that the court correctly found that the right of action was not barred by the provisions of section 337, Code of Civil Procedure, as contended for by appellants. The judgment and order should be reversed and the cause remanded.

We concur: Vanclief, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded.

STONE v. HAMMELL.*

No. 13,024; September 2, 1889.

22 Pac. 203.

Suretyship—Action Against Principal by Surety.—Where the maker of a note gives his sureties a mortgage to secure its payment, and the property is sold and the proceeds applied on the note, the maker cannot dispute the satisfaction of such mortgage in an action against him by a surety who has paid part of the note.

Suretyship—Contribution and Reimbursement from Principal.—Under Civil Code, section 2848, providing that a surety, upon paying the principal's debt, is entitled to enforce all the creditor's rights of action against the principal for the amount so expended, and to require his cosureties to contribute thereto, a cosurety, having so contributed by giving his own note to the paying surety, is entitled to reimbursement from the principal precisely as if he had paid the money to the creditor.

Suretyship.—Where a Surety on a Note Holds Security for the payment thereof, the creditor is not bound to require the application of such security to the payment before he can sue the sureties.

Suretyship—Contribution.—A Surety Who has Paid a Note and received contribution from a cosurety is not a necessary party to a suit by the latter against the principal for the amount contributed.

Suretyship—Contribution—Limitation of Actions.—Code of Civil Procedure, section 339, provides that an action on a contract

*For subsequent opinion in bank, see 83 Cal. 547, 17 Am. St. Rep. 272, 23 Pac. 703.

not in writing must be brought within two years. Section 351 provides that when the right of action against a party accrues during his absence from the state, the action may be brought within the time limited after his return. Held, that the surety's right of action for contribution against a cosurety who was absent from the state when the note was paid accrued on his return, and the cosurety's right of action against the principal accrued on his giving his note for the amount of such contribution within two years after returning.

Insolvency—Effect of Discharge.—The Rights of a Creditor are not Affected by the discharge in insolvency of his debtor, where neither the creditor himself nor his debt were within the jurisdiction of the court in which the proceedings in insolvency were had.

Insolvency.—The Discharge in Insolvency of a Debtor does not affect the rights of his surety on a note who subsequently contributes to the payment thereof.

Suretyship—Action Against Principal by Surety.—The records of a probate court, showing the insolvency of a deceased surety who had not contributed to the payment of the note, are admissible in evidence in an action by a cosurety against the principal.

APPEAL from Superior Court, Santa Barbara County; R. M. Dillard, Judge.

Action by H. P. Stone against James Hammell to recover $1,000 and interest. Judgment for plaintiff and defendant appeals. Code of Civil Procedure sections 337, 339, provide that an action founded upon a writing executed in said state must be brought within four years after the right of action accrues, and an action upon a contract, etc., not founded upon a writing, within two years thereafter. Section 351 provides that, when the right of action against a person accrues during his absence from the state, such action may be brought within the time limited after his return thereto. Civil Code sections 2847, 2848, provide that a surety, upon satisfying the obligation of his principal, is entitled to enforce every remedy which the creditor has against the principal, to the extent of reimbursing what he has expended, and also to require all his cosureties to contribute thereto.

Wells, Guthrie & Lee and S. W. Bouton for appellant; B. F. Thomas for respondent.

FOOTE, C.—This action was brought by the plaintiff to recover from the defendant the sum of $1,000 and interest.

It is alleged in the complaint that the plaintiff, with three other persons, became the sureties of the defendant upon a promissory note, payable to one Byron Stevens, for the sum of $3,000, the money borrowed, for which the note was given, being for the use and benefit of the defendant, and received and used by him alone; that the defendant neglected to pay the note, or any part of it; that Newell, one of the sureties, paid upon the note, as principal and interest, the sum of $3,855, of which sum the defendant repaid him the sum of $1,075 only; that the plaintiff, Stone, about the 1st of August, 1878, changed his residence from the state of California to the state of New York, and the said 1st of August left the state of California, and was absent therefrom until December, 1883; that about the 1st of March, 1884, Newell, the surety who had paid the promissory note to Stevens, demanded of Stone, the plaintiff, that he should pay the sum of $1,000, as plaintiff's pro rata share of the money which Newell had paid on account of their suretyship on the promissory note; that the plaintiff, on the 1st of March, 1884, made, executed, and delivered to Newell his promissory note in the sum of $1,000 in full satisfaction of the amount of money which the plaintiff should contribute to Newell for his payments for and on account of the promissory note to Stevens, and Newell gave to the plaintiff a receipt in full satisfaction for the plaintiff's liability to contribute to him for the payments he made as heretofore stated; that the defendant has not paid the plaintiff anything, either principal or interest, for the sum of $1,000 thus paid out for the defendant to Newell; that one of the four sureties, Hamilton, paid nothing on the note to Stevens, and contributed nothing to Newell, and that Hamilton died insolvent. The complaint was demurred to on the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) that it did not state facts sufficient to constitute a cause of action in this, "that it appears from said complaint that the plaintiff has not legal capacity to sue; second, that it appears upon the face of said complaint that the last payment made upon the note, set out in the first paragraph thereof, was made on the tenth day of January, 1881, by P. N. Newell, and that the cause of action, if any, accrued on said tenth day of January, 1881, in favor of said P. N. Newell, and that the cause of action in favor of said P. N. Newell, if any, is

barred by the statute of limitations, and that the cause of action, if any, was barred by the statute of limitations, at the time of the pretended demand and the making of the note for $1,000 by plaintiff to P. N. Newell, on the first day of March, 1884, alleged in said complaint; that said complaint is ambiguous, unintelligible and uncertain in this, that it does not sufficiently appear from said complaint whether or not the note referred to in the eighth paragraph thereof was ever paid by plaintiff; that it does not sufficiently appear from said complaint that the plaintiff ever paid any money whatever for or on account of defendant; that it does not sufficiently appear from said complaint that the plaintiff's cause of action alleged in said complaint is not barred by the statute of limitations; that there is a defect in parties plaintiff to said action, in this, that it appears from said complaint that P. N. Newell should be made plaintiff to said action, instead of the plaintiff herein; that said complaint does not, nor does any paragraph thereof, severally state facts sufficient to constitute a cause of action." The demurrer was overruled, and the defendant answered, objecting to the complaint that it did not state facts sufficient to constitute a cause of action; that the plaintiff had no legal capacity to sue; that the cause of action, if any, accrued on the 10th of January, 1881, in favor of Newell, and that it is barred by the statute of limitations under the provisions of sections 337 and 339 of the Code of Civil Procedure; denying that the time of payment of the note to Stevens was extended to the 1st of July, 1880, or that he neglected to pay the note, or any part of it; and alleging that before the note became due he had mortgaged certain real property to the sureties on his note to Stevens, sufficient in value for the payment and satisfaction of the note, and that subsequently he conveyed to Newell, one of the sureties, a portion of the premises thus mortgaged of the value of $1,400, which the sureties afterward sold and applied the proceeds to the payment of the Stevens note. He further claimed that the payments alleged to have been made by Newell were from the proceeds of the property mortgaged and conveyed to the sureties. He denied that he had only paid $1,075 of the amounts paid by Newell on the Stevens note, and alleged that he paid the whole of what Newell paid, and that nothing is due from him to Newell. All the other allegations of the com-

plaint are denied. For further defense the answer set up that if Stone contributed anything toward the repayment of Newell for what he had paid out for and on account of the defendant, such payment was entirely voluntary, and without any consideration good in law, and that the plaintiff ought not to recover against him because of his discharge in insolvency on the twenty-fourth day of December, 1879, by the county court of Santa Barbara county, California. The answer was afterward, upon leave of the court, amended so as to defend the action on the ground that, so far from neglecting or refusing to pay the Stevens note, the defendant, before the note became due, on the fifth day of August, 1878, executed and delivered to the plaintiff and Newell a deed absolute in form, but by way of a mortgage, conveying to Stone and Newell certain real estate in Santa Barbara county, fully described in said deed in trust, to sell and dispose of the property conveyed, and to apply the proceeds in satisfaction of the Byron Stevens note, on which Stone and Newell were the defendant's sureties; that the conveyance thus made was accepted by Stone and Newell in trust for the purposes above specified, and was, at Stone's request, recorded on the 13th of August, 1878, in the proper office. It is further alleged that the property so conveyed was more than sufficient in value for the payment and satisfaction of the note to Stevens, and interest; that it was worth $5,000, and that plaintiff and Newell, after its conveyance to them, and before the first day of March, 1884, disposed of a large portion of it for the sum of $3,500, and that at the time of the commencement of this action there remained a portion of the property thus conveyed undisposed of and held by the sureties of the value of $500. A demurrer was filed to this amendment, on the grounds, first, that it did not state facts sufficient to constitute a cause of action; second, that, in so far as it refers to any mortgage or deed of trust, it does not state any fact constituting any defense. "Said instrument, if a mortgage, has become extinguished by lapse of time, and could not have been enforced when this action was commenced, nor could it be now enforced." This demurrer was overruled, and the cause was tried without a jury, upon the issues made by the complaint and answer as amended. The plaintiff had judgment as

prayed for. From that and an order refusing a new trial this appeal is prosecuted.

One of the reasons urged by the defendant why the judgment cannot stand is, to use his own language, "that the plaintiff could not sue the defendant on his implied promise on the note, because his remedy on the note was merged in a superior remedy, i. e., the mortgage given by defendant to his sureties." In support of this proposition he argues that the remedy in assumpsit on an implied contract originally vested in the sureties against their principal, became merged on their accepting a mortgage security therefor, and their only remedy was an action for foreclosure. The fact which he relies on to uphold his legal proposition is that the mortgage given to all four of the sureties was never legally satisfied, because Byron Stevens, the payee of the note which the defendant and sureties had executed, was not a party to the satisfaction of the mortgage, and that, as the mortgage was not satisfied, the deed in form, which the court found to be in trust, but not a mortgage, was a mortgage, and was supplementary to the first mortgage, and the remedy of foreclosure of it could only be pursued. But Stevens has been paid from the proceeds of the property deeded to the sureties, so far as it was sold, whether it was a mortgage, or, as the court found, a deed in trust only for a specific purpose which was carried out, and he is not here complaining of the satisfaction of the mortgage. The person who does complain, and who seeks to have the mortgage declared unsatisfied, was a party to its satisfaction, and is excluded by his action in the premises from disputing its proper and legal satisfaction.

The further contention is made that the finding of the court, that the action is not barred by the statute of limitations, is against law. To support this claim the appellant seems to argue that when Stone executed and delivered his promissory notes, which were agreed to be taken as an absolute payment and reimbursement to Newell of Stone's share of the money paid out to Stevens by Newell, he (Stone) was under no legal obligation to do so; that he could have invoked the statute of limitations against Newell for this contribution. This seems to be based upon the proposition that although Stone was absent from the state during most of the time that Newell was making payments to Stevens, who was also a nonresident,

yet that the statute began to run in favor of Stone as soon as Newell paid the first installment of interest, $360, on the note, when Stone was in the state, and continued to run, notwithstanding his absence from the state after that time: Code Civ. Proc., sec. 351. The court found, upon sufficient evidence, that Stone, about the 1st of August, 1878, removed from the state of California to the state of New York, where he remained until December, 1883. Up to the time of Stone's removal Newell had not paid more than his share as surety, and all that he paid after that time, for which Stone was liable for contribution, was paid during Stone's absence from the state. Unless, therefore, this action was not brought until after the time had elapsed, prescribed by sections 337 and 339 of the Code of Civil Procedure, for the barring of the action after Stone's return, he (Newell) was not precluded from recovery by those statutes: Code Civ. Proc., sec. 351. Stone's right of action accrued on the 1st of March, 1884, when he reimbursed Newell for his expenditures by executing the promissory notes, which were taken as absolute payment for the liability of Stone to Newell for Stone's share of the money paid to Stevens, the payee of the note: Brandt on Suretyship and Guaranty, sec. 199. The statute did not begin to run against Stone until the 1st of March, 1884. He filed his complaint on the seventeenth day of September, 1885, less than two years after the statute began to operate, and was not barred. Newell's right of action against Stone was not barred, because the latter did not return to California until December, 1883, and Stone paid Newell by notes on the 1st of March, 1884.

In this connection the appellant claims that the payment by Stone's notes to Newell of Stone's pro rata of the money which Newell had paid to Stevens for the defendant was no payment or reimbursement affecting defendant on account of his liability on the Stevens note. But it seems to have been held in this and in most of the other states that the acceptance of a promissory note in satisfaction and payment of a debt due from one individual to another is payment of the first debt: Griffith v. Grogan, 12 Cal. 323, and cases cited. When Newell paid the money for the defendant as his surety in satisfaction of the Stevens note he had the right to be reimbursed by the defendant for what he expended in that

behalf: Civ. Code, secs. 2847, 2848; Estate of Hill, 67 Cal. 244, 7 Pac. 664. He had also the right to be reimbursed by Stone for whatever amount Stone, as cosurety, was liable to pay Stevens as his proportion, and which had been paid by Newell to Stevens. When Stone paid Newell his liability to him, by the execution of the promissory notes taken in absolute payment and satisfaction of the debt, then Stone had the right, as a surety for Hammell, to look to him for reimbursement, because then Stone occupied toward him pro tanto the same relation that Newell did in paying Stevens such amount, for Stone had paid to Newell, not only what he was bound to contribute to reimburse him, but also so much of what Newell had paid for the defendant, and to that extent Stone then stood toward the defendant as if he had originally paid so much of the debt to Stevens. Newell had the right, in the first instance, to give his note to the creditor, Stevens, in full satisfaction for the debt of the defendant, and could then have sued him without having paid the note: Brandt on Suretyship and Guaranty, sec. 181. Stone, having paid to Newell, to his satisfaction, by note, his pro rata contribution of what Newell had paid for the defendant to the creditor, had a right to be reimbursed to that extent by Hammell for the actual payment in money of that sum by Newell to Stevens. The matter stood just as if Stone, instead of Newell, had paid Stone's proportion in money to the creditor for Hammell, and Stone has the same right as Newell had when he paid the debt in money.

But it is claimed that Newell, at the time Stone executed the notes, had no right of action against Stone for contribution, because he had not exhausted the securities in his hands, had not sold all the land included in the deed in trust, and applied the proceeds to the payment of the Stevens note; that his failure to do this exonerated Stone from any liability to reimburse Newell for what he had paid Stevens. The authorities cited in support of this proposition are not in point. There is no evidence in the record but what Newell realized, as far as he could reasonably do so, all that could fairly be obtained from the sale of the property held in trust, and that, after applying it all to the payment of the Stevens note, he was out of pocket as much money as would have made Stone's share in contribution amount to what his notes called for.

There is no negligence, laches, or fraud shown in the matter, and Stone was liable to contribution when he gave his notes.

We perceive nothing of merit in the point made that Newell paid the debt voluntarily to Stevens without any liability to do so. The principal creditor, as it seems to us, could have sued the sureties whenever the note became due and remained unpaid. There was no necessity for him before doing so to have had the land held by the surety, Newell, as trustee, sold and the proceeds applied to the payment of his debt, even if it could have been done under the trust deed, for, as the record shows, this was done in good faith, and without any delay, by Newell, and the proceeds applied to the payment of the Stevens note.

The further point is made that the discharge of Hammell in insolvency discharged him of all indebtedness to Byron Stevens, the holder of the promissory note which the sureties executed with the defendant, and that the finding or decision of the trial court, that the insolvency court had no jurisdiction over Stevens, is against law, and that the discharge of the defendant in insolvency is a bar to the recovery of the plaintiff in this action. In its twelfth finding of fact, which is, we think, warranted by the evidence, the trial court found "that Byron Stevens, the payee of the said note mentioned in the first finding hereof, was not a resident of the state of California, and was absent therefrom during all the proceedings in the Matter of the Insolvency of James Hammell, and did not in any way submit either himself or said promissory note to the jurisdiction of the court in which such proceedings were had." This being so, Stevens was not affected in his rights by the discharge in insolvency as pleaded: Rhodes v. Borden, 67 Cal. 7, 6 Pac. 850, and cases cited. This discharge in insolvency left Newell and Stone still responsible to Stevens.

At the time of the insolvency proceedings Stone could not have brought suit against Hammell, because then Stone had paid out nothing as surety, and until he satisfied and paid Newell, there was no breach of the implied promise of Hammell to reimburse him: Brandt on Suretyship and Guaranty, sec. 199. If Stone had no debt against Hammell which was provable in insolvency, it cannot be that he is barred of recovery by the proceedings and discharge in insolvency which

took place prior to the time when his debt and right to sue Hammell accrued. In a case involving the same principle which is invoked here, it was said: "The debt was not made certain until after the defendant's discharge. It is like the case of a surety paying a debt after the discharge of the principal. The debt must be certain and fixed at the time of the insolvent's assignment": Buel v. Gordon, 6 Johns. (N. Y.) 126.

We perceive nothing in the point that Newell should have been made a party. He had paid the note and been paid by Stone his contribution. Stone then had the right of action upon an implied contract against the principal, Hammell, for reimbursement. The court found, upon evidence which is not challenged by any specifications of particulars of its sufficiency, that Hamilton, one of the sureties, died insolvent in 1878, and contributed nothing toward the payment of the note in the first instance by Newell, or repayment to him as a co-surety. But the objection is made that a certain record of the probate court proceeding offered and admitted in evidence was not competent, relevant, or material. We think that the evidence tended to show the financial standing and insolvency of Hamilton, and was properly admitted. The evidence was sufficient to support the findings attacked, and, perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Gibson, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

McDANIEL v. CUMMINGS.

No. 13,173; September 12, 1889.

22 Pac. 216.

Surface Water—Unobstructed Flow.—Under Civil Code, section 801, providing that the right of receiving water from or discharging it upon land, and "the right of having water flow without diminution or disturbance of any kind," may be attached as easements to other lands, the owner of upper land is entitled to the natural and unob-

structed flow of the surface water on and across adjoining land, and if the common-law rule is otherwise, it is abrogated by Political Code, section 4468, providing that the common law is the rule of decision "so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state."

APPEAL from Superior Court, Colusa County; E. A. Bridgford, Judge.

H. M. Albery for appellant; Edwin Swinford and John T. Harrington for respondent.

WORKS, J.—The appellant being the owner of lands above and adjoining the lands of the respondent, the surface water from the lands flowed naturally on and across the lands of the latter. To prevent such flow the respondent constructed a dam on the line of his lands, thereby obstructing the waters and backing them onto the appellant's lands, to his damage. This action was brought to enjoin the respondent from thus obstructing the flow of the water as stated. A temporary injunction was issued, but was subsequently dissolved by the court below on the ground that, by the law of this state, the respondent had the right to obstruct and prevent the flow of the waters across his lands, although, by so doing, he overflowed and injured the lands of appellant. This court has held directly to the contrary in a well-considered case: Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213.

We are informed by the opinion of the learned judge of the court below, set out in the transcript, that he proceeded on the theory that by section 4468 of the Political Code the common law is made the rule of decision in this state, and that by the common law this action could not be maintained. But, conceding that such is the common-law rule, the section of the code referred to only makes the common law the rule of decision "so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state."

Section 801 of our Civil Code provides: "The following land burdens, or servitudes upon land, may be attached to other lands as incidents or appurtenances, and are then called 'easements.' . . . . 9. The right of receiving water from or discharging the same upon land. . . . . 11. The right of having water flow without diminution or disturbance of any

kind." The appellant had the right, as an incident to his lands, to have the surface waters that might accumulate thereon flow on and across the respondent's lands, as they were accustomed to flow naturally; and the common law, conceding it to be as contended by the respondent, is clearly in conflict with this plain provision of the code, and can have no application to the question presented.

We are of the opinion that the rule laid down in Ogburn v. Connor, supra, is eminently just and right, and that it should not be disturbed. Order reversed.

We concur: Beatty, C. J.; Paterson, J.; Sharpstein, J.; Thornton, J.; Fox, J.; McFarland, J.

FOX v. DYER et al.

No. 12,509; September 24, 1889.

22 Pac. 257.

Fraudulent Conveyances—Complaint.—In an Action to Set Aside fraudulent conveyances, a complaint which does not sufficiently state the facts constituting the fraud, and does not show that plaintiff would have been injured thereby, is demurrable.

APPEAL from Superior Court, Alameda County; N. Hamilton, Judge.

Action to set aside fraudulent conveyances, by Fox against Dyer and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

E. J. & J. H. Moore and A. E. Ball for appellant; Haggin & Dibble and Metcalf & Metcalf for respondents.

WORKS, J.—The complaint in this case attempts to state the facts showing that certain conveyances of real estate by an assignee in insolvency were fraudulent, and that the plaintiff, as one of the creditors of the insolvent, was thereby damaged. The complaint is unnecessarily long, and to attempt

to state even its substance would for that reason extend this opinion in like manner, and serve no useful purpose. The court below sustained a demurrer to the complaint, and we think properly. It does not sufficiently state the facts claimed to have constituted the fraud, nor does it show that the plaintiff was in a position to have been injured, conceding that the conveyances were fraudulently made. Judgment affirmed.

We concur: Fox, J.; Paterson, J.

GORDON HARDWARE CO. v. SAN FRANCISCO & S. R. R. CO.*

No. 12,030; October 4, 1889.

22 Pac. 406.

Mechanics' Liens.—A Claim of Lien, Filed by a Materialman, giving the names of several persons to whom different portions of the material were furnished at different times, without any designation as to what portion was furnished to each severally, does not sufficiently comply with Code of Civil Procedure of California, section 1187, requiring the claim to state "the name of the person by whom he was employed, or to whom he furnished the materials."

Mechanics' Liens.—A Description of the Materials Furnished as "nails, spikes, iron, steel, picks, shovels, and other like material," is too indefinite and uncertain to sustain the lien.[1]

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*For subsequent opinion in bank, see 86 Cal. 620, 25 Pac. 125.

[1] **Cited** and approved in Tsutakawa v. Kumamoto, 53 Wash. 236, 101 Pac. 871, where a lien for provisions, groceries and camp equivalent furnished a subcontractor on a railroad was disallowed.

Cited in Cincinnati R. & M. Ry. Co. v. Shera et al., 36 Ind. App. 320, 73 N. E. 295, as authority for denying a lien for coal consumed in the operation of a steam shovel.

Cited and approved in Cincinnati R. & M. Ry. Co. v. Shera et al., 36 Ind. App. 317, 73 N. E. 294, as holding that a too remote connection with the work of putting up or completing the structure excludes an article from consideration for lien purposes.

Cited in the note in Ann. Cas. 1912B, 228, on tools and appliances used for construction work as materials for which mechanics' liens may be had.

APPEAL from Superior Court, Marin County.

Hepburn Wilkins for appellant; Lloyd & Wood and F. S. Lippitt (O. P. Evans of counsel) for respondent.

FOX, J.—This is an action by materialmen to enforce a lien for material furnished to certain original contractors to be used under their contract "to construct the excavations, embankments, tunnels, box culverts, rubble walls, and such bridges as might be designated by the chief engineer of said railroad company on all that portion of the located line of railroad, then projected, of the San Francisco and San Rafael Railroad lying between the town of San Rafael and Point Tiburon in Marin county," with certain exceptions not necessary here to repeat. The case turns entirely upon the question of whether or not the court erred in sustaining defendant's objection to plaintiff's offer in evidence of "The Claim of Lien," which was filed in the county recorder's office of Marin county, on the eighteenth day of June, 1884, a copy of which is set forth in the record. When this claim of lien was offered in evidence the defendant objected thereto on several grounds, one of which was: "It does not appear to have been filed within thirty days after the completion of the work." This ground of objection seems to be good. The plaintiff does not claim to be other than a materialman, or a subcontractor for the furnishing of material, under an original contractor. He was, therefore, required by the statute, if he claimed a lien, to file the same within thirty days after the completion of the work. The claim was filed June 18, 1884. The evidence shows, and upon that point there does not seem to be any material conflict, that the last work done under the contract, or by the contractors, was on the 2d of June, 1884, and that for two weeks prior to that time they had not been working on the contract work, but had been engaged in removing debris which the contractor, without right, and in violation of instructions, had dumped on the land of a stranger, and for which he was liable in damages. The men were instructed to do this work on the seventeenth day of May, and the contract work was presumably finished at that time. Even if it was not, it appears clear from the evidence that it was finished, or that no more was done on it after the

men commenced to remove this debris, which was two weeks prior to the 2d of June, and in either event this was more than thirty days before the filing of this claim of lien. However, the margin was so close that we should be unwilling on this ground alone to disturb the finding of the court below, whichever way it had ruled. Other grounds of objection were that the claim of lien did not state the demand, or the terms of the contract, upon and for which the lien is claimed. The claim shows upon its face that the original contractor for the work was one McDonald. With him the plaintiff contracted for the delivery of the material, as required. McDonald entered upon the performance of his contract in October, 1882, and prosecuted the same until February 6, 1883, plaintiff furnishing material as required. On the last-named date McDonald assigned to one Hawley. Plaintiff then contracted with Hawley, as before. He died before the work was completed, and it was subsequently carried on and completed by the legal representative of the estate of Hawley, to whom, the claim shows, plaintiff continued to deliver material as required, until the completion of the work. The statute expressly provides that the claim filed shall contain a statement of the demand, after deducting all just credits and offsets, with the name of the owner, or reputed owner, and "also the name of the person by whom he was employed, or to whom he furnished the materials": Code Civ. Proc., sec. 1187. The lien can be maintained only by a substantial observance of the provisions of the statute: Wood v. Wrede, 46 Cal. 637; Hooper v. Flood, 54 Cal. 218; Goss v. Strelitz, 54 Cal. 640. The object of the statute is to advise the owner at whose instance the material was furnished. Where, as in this case, material was furnished at divers times, and at the request of, or under subcontract with, different persons, it is not a substantial compliance with the statute for a materialman to file a claim for the gross sum of the balance claimed for all material furnished for that work, without any designation of the amount claimed on account of material furnished at the request of either or any one of the several persons at whose request it was furnished. For all the purposes of the statute, he might as well omit giving the name of any person for whom, or at whose instance, he had furnished the material. Such an omission would be fatal: Phelps v. Mining Co., 49 Cal. 339.

We think it equally fatal to give the names of several persons to whom different portions of the material have been furnished at different times, without any designation as to what portion was furnished to each severally. As to the objection that the claim as filed does not state the terms of the contract upon or for which the lien is claimed, it is not necessary for us here to pass upon it. The claim does intelligibly state the terms of plaintiff's contracts with the several original contractors, but it gives no information as to the terms of their contracts, except in the single particular of what they undertook to do. The statute is not free from ambiguity as to which of the contracts is referred to in that part of it which requires a statement of the terms of the contract; but, looking to the purpose of the requirement, it would seem to be the subcontract, for of this the owner may not be otherwise advised, while he is presumed to know the terms of the contract between himself and the original contractor.

An objection was also taken on the ground that the description of the materials furnished was too indefinite and insufficient to sustain a lien. The only description of the materials was that they consisted of "nails, spikes, iron, steel, picks, shovels, and other like material." This is altogether too indefinite and uncertain to sustain a lien, and especially since it is conceded to be the law that a lien can only be maintained for the material which was actually used in the work contracted to be done. We understand that to mean, in a case like this, that which became by its use a part of the completed work. That, certainly, could not include tools of trade—"picks, shovels, and other like material." And it would not necessarily include any one of the items mentioned in the claim. As well might a house be held under a lien for a chest of carpenter's tools sold to the man who had contracted to build it as a railroad for picks and shovels used by a contractor in grading it, or for nails, spikes, iron, steel, and other like material used by him for the purpose of erecting temporary habitations and sheds for the occupancy of his men and animals while engaged in the work. These objections being fatal to the claim of lien, as offered, we need not consider other objections which were urged. Our conclusion is that the court did not err in sustaining the objection to the introduction of this claim of lien. The foreclosure of the

claim being the sole purpose of the action, there was no error in granting the nonsuit. Judgment and order affirmed.

We concur: Works, J.; Paterson, J.

HARMON v. SAN FRANCISCO & S. R. R. CO.*

No. 12,017; October 4, 1889.

22 Pac. 407.

Mechanics' Liens.—The Fact That a Claim of Lien, Filed by a Materialman, included more than was due him, if the error was without fraud, will not defeat his right to recover.

APPEAL from Superior Court, Marin County.

F. H. Boalt and H. A. Powell for appellant; Lloyd & Wood and Hepburn Wilkins for respondent.

FOX, J.—This case is like that of Gordon Hardware Co. v. Same Defendant, ante, p. 140, 22 Pac. 406 (No. 12,030, just decided), except that at the hearing, on the offer in evidence of the claim of lien, which was substantially like that in the other case, open to all the same objections, and objected to on the same grounds, the court overruled the objections, and admitted the claim in evidence; but afterward, upon plaintiff's resting his case, the court, on motion of defendant, struck out the said claim from the evidence, to which plaintiff excepted, and thereupon the nonsuit followed, as before. This was only another way of reaching the same result, and for the same reasons. In his proofs in this case the plaintiff showed what part of the material furnished by him had not gone into and become a part of the actual structure, which would reduce his claim by some $6,000; and, if there had been no other ground of objection, the bare fact that he had filed his lien for too much, if it were shown that it was done without fraud, would not have defeated his right to recover. But this did not cure the defects in the claim of lien, to which attention is called in the opinion filed in said No. 12,030, and on the authority of that

*For subsequent opinion in bank, see 86 Cal. 617, 25 Pac. 124.

case the judgment and order appealed from in this case are affirmed.

We concur: Works, J.; Paterson, J.

CALIFORNIA POWDER WORKS v. BLUE TENT CONSOLIDATED HYDRAULIC GOLD MINES OF CALIFORNIA, LIMITED.

No. 11,896; October 8, 1889.

22 Pac. 391.

Mechanics' Liens—Mines—Notice.—The Claimant of a lien for materials furnished set out in its notice that the claimant undertook to furnish to a certain mining company explosives in such quantities as it might require, each parcel to be paid for at delivery, or as soon thereafter as might be, with interest upon such payments in case of delay. Held, that this notice was in substantial compliance with Code of Civil Procedure, section 1187, requiring such claimant to state the terms, time given, and conditions of his contract, wherein the words "time given" mean the time of payment for the materials furnished.[1]

Mechanic's Lien—Mines—Notice.—Code of Civil Procedure, section 1187, which provides that the notice of such claim must be filed within thirty days after the completion of the improvement, alteration, etc., does not refer to the operation of the mine, which may be continuous in its nature, as the thing to be completed.

Mechanic's Lien—Mines—Time for Filing.—As the right to a lien does not attach until the materials have been used, plaintiff does not lose such right by a failure to file its claim within thirty days after the materials were furnished.[2]

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[1] **Cited** and approved in Barker & Stewart Lumber Co. v. Marathon Paper Mills Co., 146 Wis. 22, 130 N. W. 869, where, discussing explosives as a subject of a mechanic's lien, the court says that in these cases the liens have been granted on the principle that when the material is used directly upon the work or structure itself, instrumental in producing the final result, and is actually consumed in the use, it may be said to have entered into and to form a part of the completed structure.

[2] **Cited** as authority in Reed v. Norton, 90 Cal. 599, 26 Pac. 769, where, as to the significance of the word "used," the court says: "If this hardware and building materials were affixed and attached to the building, they must be said to have been used in the construction and erection of it."

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawler, Judge.

Olney, Chickering & Thomas for appellant; Pillsbury & Blanding for respondent.

BELCHER, C. C.—This action was brought to recover judgment for a balance due for powder and other explosive materials sold by plaintiff to defendant for use, and actually used, upon defendant's mining property in Nevada county, and to enforce a lien therefor on the property. The complaint was demurred to on the ground of ambiguity, the demurrer was overruled, and thereupon the defendant answered. After trial, judgment was rendered in favor of plaintiff for the amount prayed for, including an attorney's fee, and the whole amount was declared to be a valid lien upon the property. The appeal is taken by defendant from the judgment, and an order denying a new trial.

The court found upon every issue in favor of plaintiff. The appellant concedes that the finding as to the amount of the indebtedness was authorized, and no objection is made to the judgment in so far as it relates to that indebtedness; but it is contended that plaintiff was not entitled to a lien, and that the part of the judgment which awarded an attorney's fee, and declared the judgment a lien upon the property, was erroneous. It is admitted that, if plaintiff was entitled to a lien, the amount awarded as an attorney's fee was reasonable and proper. The material facts of the case are, in substance, as follows: Plaintiff was a corporation, organized in this state, and engaged in the business of manufacturing powder and other explosives. Defendant was a foreign corporation, engaged in the business of mining in Nevada county, in this state. In 1875, defendant, by its attorney in fact and general manager, Thomas Price, entered into a contract with plaintiff, by which plaintiff agreed to furnish defendant with all the powder, caps, and fuse it should need to develop and work its mine, the materials so furnished to be paid for upon the delivery of each parcel thereof, or as soon thereafter as might be, and, in case of delay in payment, the amount delayed to bear interest at the rate of one per cent per month. No specific quantity was named, but plaintiff was informed

that, under the contract, defendant would probably need from eight to ten carloads a year. No time was named for the completion of the contract, and it remained in force without any change of terms till within thirty days prior to November 1, 1883. Under the contract plaintiff furnished defendant with explosives from time to time, as they were ordered, up to the sixteenth day of July, 1883; and all the materials thus furnished were used by defendant in the construction of ditches and tunnels, and in other work upon its mine. Payments on account of such supplies were made from year to year, whenever a clean-up was made. The last clean-up was made about the 1st of September, 1883, and the last payment on the fourth day of that month. General work upon the property ceased at the time of the last clean-up, but some work to protect and keep the property in repair continued to be done till the 1st of November. On the thirty-first day of October, 1883, an account was stated between the plaintiff and defendant, the defendant acting by its attorney in fact, Thomas Price, and the amount found and agreed to be due plaintiff for materials furnished under the contract was $77,447.76. On the next day, November 1st, plaintiff filed its claim of lien for this sum, and thereafter, in proper time, commenced this action.

1. The demurrer was properly overruled. We see no material ambiguity or uncertainty in the complaint, and no argument upon this point is made for appellant.

2. It is contended that the notice of lien was insufficient, because the contract set out had no date, and the notice did not specify any time when the contract was made, or when any transaction was had between the parties. All that the law required a claimant to state in his claim of lien, as to the contract, was "the terms, time given, and conditions of his contract" (Code Civ. Proc., sec. 1187); and it has been held that the words "time given" mean not the date or time when the contract was made, but "the time of payment for the work and labor performed and materials furnished, as agreed on and expressed in the contract": Hills v. Ohlig, 63 Cal. 104. The terms, time given, and conditions of the contract under which the materials were furnished in this case, as stated in the claim of lien, were that the plaintiff (naming it) "should, and it undertook that it would, thereafter, continuously, and

from time to time, and in such quantities as the said" defendant (naming it) "should thereafter request, furnish to said" defendant, and that the said defendant "should take and receive of and from the said" plaintiff, "in such quantities as said" defendant "might require in its said business, the said blasting powder, caps, and fuse; and that said material so delivered should be paid for upon delivery of each parcel, or as soon thereafter as might be; and that in case of delay in payment the said" defendant "should pay interest upon the amount so delayed at the rate of one per centum per month."

We find nothing in the law requiring any statement in the claim of lien as to the date of the contract, or as to when the transactions were had between the parties, and in our opinion the notice filed by plaintiff was in substantial compliance with the requirements of the statute.

3. It is next contended that the notice of lien was prematurely filed. This contention is based upon the provisions of the Code of Civil Procedure, fixing a time within which a notice of lien must be filed. The provision is that all persons other than original contractors (and that plaintiff was not an original contractor, see Sparks v. Mining Co., 55 Cal. 389, and Schwartz v. Knight, 74 Cal. 432, 16 Pac. 235) must file the notice within thirty days after "the completion" of the improvement, alteration, etc. It is alleged in the complaint that "the construction, alteration, and repair of said mining claim, ditch, ditches, aqueducts, tunnels, and other structures on said premises, has been, during all said time, kept up by said defendant, and the same has not been completed." And it is argued that if there had been no "completion" the notice was premature. The record shows that the defendant's mining claim embraced six hundred and forty acres of mineral land; that defendant had been mining on the claim for eight years, and only about fifteen acres had been worked off; that the operations carried on were the ordinary operations of hydraulic mining, and that the powder used for the mine was used in blasting down the banks, and in pulverizing the cement. It is evident that work upon a mine like this is continuous in its nature and has no definite completion, but may go on for fifty years or more. The statute, therefore, cannot have reference to the work upon the mine as the thing to be

completed. To hold otherwise would, in effect, be saying that the legislature was guilty of the absurdity of referring to the completion of a thing which has no necessary completion, but may go on indefinitely. We do not think the claim was filed prematurely.

4. It is next urged that the claim, if not filed too soon, was filed too late, and was therefore invalid. The argument is based upon the fact that all the materials for which a lien is claimed were sold and delivered by plaintiff to defendant more than thirty days prior to November 1, 1883. But the right to a lien did not attach when the materials were furnished. To give it that right it was necessary for the plaintiff to show not only that it had sold the materials to be used on the defendant's mine, but that they had actually been so used: Silvester v. Mine Co., 80 Cal. 510, 22 Pac. 217 (opinion filed September 11, 1889). Evidently, when a party obtains blasting powder to be used in mining operations, as in this case, very little, if any, of it would ordinarily be used on the day of its delivery, and most or all of it might not be used for days or months thereafter. Here it appears that all the powder furnished by plaintiff had been actually used by defendant when the lien was filed, but it does not appear at what particular time or times the last of it was so used. It must follow, therefore, that the plaintiff did not lose its right to a lien because of its failure to file its claim within thirty days after the materials were furnished.

5. It is not questioned that a materialman may have a lien in a case like this, and that he can have one: See Giant Powder Co. v. Flume Co., 78 Cal. 193, 20 Pac. 419. This being so, the question remains, Was the plaintiff's claim filed in time? The only provision of the statute upon the subject is that "every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record," etc.: Code Civ. Proc., sec. 1187. There was, however, as we have seen, no completion of the improvement of the mine, or of the alteration or repair thereof. The language quoted is therefore not strictly applicable to the case in hand, and no definite time was fixed within which

the claim was required to be filed, unless the use of the material or the suspension of work on the mine should be treated as the completion referred to: See Schwartz v. Knight, supra. But if no definite time was fixed by statute, then it was necessary only that the claim be filed within a reasonable time, and we cannot say that it was not so filed. If, on the other hand, the thirty days commenced to run when the last of the material was used, or when work was suspended on the mine, still we cannot say that the filing was not in time. The court found that "the defendant was engaged in the mining business upon the premises described in the complaint in this action, and was using the said premises, and the whole thereof, including the said ditches, flumes, aqueducts, reservoirs, tunnels, and other structures and improvements for that purpose, and had been so engaged in the business of mining upon said premises, and using the same for that purpose, within the period of thirty days next prior to said first day of November." This finding is assailed as not justified by the evidence, and it is specified that "the evidence shows that the defendant herein was not engaged in the mining business upon the premises described in the complaint at any time after the first day of October, 1883." But we think there was evidence tending to support the finding. A witness for the plaintiff testified that "there was more or less work being done all the time in 1883 upon this property, to keep it in repair and condition up to the time this lien was filed." And, again: "The defendant operated the mine all the time, down to the filing of the lien." At most it can only be said, we think, that there was a conflict of evidence upon this subject.

It results, in our opinion, that the judgment and order should be affirmed.

We concur: Foote, C.; Gibson, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

BIBB et al. v. BANCROFT.

No. 12,253; October 30, 1889.

22 Pac. 484.

Agency—Instructions.—In an Action for Breach of a Contract by which plaintiff was to remove debris for defendant, the evidence showed that plaintiff, when seeking the contract, was referred by defendant to one C., and was told that anything he would do with him would be all right. On the question of agency, the court instructed as to the law of ostensible agency. Held, that the instruction was not irrelevant on the ground that an express agency only was shown by the evidence.

Agency—Evidence.—The Complaint Stated That "The Parties hereto entered into a contract," etc., and that "defendant agreed with said plaintiffs to pay them the prices stated," etc. Held, that evidence of either an express or ostensible agency in the person who made the contract with plaintiffs was admissible.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by D. H. Bibb and others against H. H. Bancroft for breach of contract. It appeared in evidence that plaintiffs, when seeking the contract, were referred by defendant to one Cook, and were told that anything they would do with him would be all right. The jury were instructed on the question of agency as follows: "Another instance is that of an agency known as an 'ostensible agency.' That exists in law where one either intentionally, or from want of ordinary care, induces another to believe that a third person is his agent, although he never in fact employed him. In other words, one may actually create another his agent, and one may, on the other hand induce a third person to believe another his agent, and to act with him as such; in which event the principal would be liable for the acts of the agent." Judgment for plaintiffs and defendant appeals.

Estee, Wilson & McCutchen for appellant; C. H. Parker and Alex. G. Eells for respondents.

PATERSON, J.—Plaintiffs alleged in their complaint that on the fourteenth day of May, 1886, they entered into an

agreement with the defendant, by the terms of which they were to remove certain debris from a lot owned by the defendant in the city and county of San Francisco, and that they were to be paid a certain price for each load of materials so removed by them. The defendant denied in his answer that any contract had been made between him and the plaintiffs. This denial raised the principal issue presented at the trial. The testimony fully sustains the allegations of the complaint. The most that can be claimed fairly by the defendant is that there is a conflict in the evidence. Under the well-established rule, therefore, this court will not interfere with the verdict or the judgment. We see no error in the rulings of the court in admitting testimony. The fact of agency, actual and ostensible, was so clearly established by the evidence, direct and indirect, that the verdict could not well have been other than it was without the testimony objected to. There was no error in the instructions of the court. Under the pleadings, it was proper for the plaintiffs to introduce any evidence tending to show an agency, either express or ostensible. That there was in Cook an express agency of some kind concerning the subject matter there can be no doubt whatever. The only question was as to its extent. The plaintiffs were not obliged under their complaint to rely upon evidence of actual agency in Cook. Judgment and order affirmed.

We concur: Works, J.; Fox, J.

TAFFT v. PRESIDIO AND FERRIES RAILWAY COMPANY.*

No. 11,988; October 30, 1889.

22 Pac. 485.

Corporate Stock—Transfer—Conversion.—If the Attorney in Fact of a stockholder presents the certificate of stock, together with a power of attorney from the stockholder giving him full authority to deal with the stock, and the corporation's officers are ignorant of any intention on the part of the attorney to misappropriate the stock,

*For subsequent opinion in bank, see 84 Cal. 131, 18 Am. St. Rep. 166, 11 L. R. A. 125, 24 Pac. 436.

the corporation will not be guilty of conversion simply by issuing another certificate in the name of the attorney, who appropriates the stock wrongfully.[1]

Corporate Stock—Transfer—Conversion.—The Fact That the Attorney was also a director of the corporation does not warrant the presumption that the corporation had notice of his intention to convert the stock to his own use, as he assumed to act, not for the corporation, but for his principal.

Corporate Stock—Transfer—Conversion.—The Lack of the Owner's Indorsement on the certificate was not inconsistent with the right of the attorney to cause the stock to be transferred to himself.

Corporate Stock—Transfer—Conversion.—The Neglect of the Officers to require an indorsement of the certificate is only nonfeasance, and is no evidence of conversion.

Corporate Stock—Transfer—Conversion.—It is not the Duty of the Officers of a corporation to inquire into the motives of an attorney in fact, having full power to transfer stock, for desiring it to be transferred to himself.[2]

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

Action by Adelia A. Tafft against the Presidio and Ferries Railroad Company, a corporation, for the conversion of stock, the property of plaintiff. Judgment for plaintiff, and defendant appeals.

Jarboe, Harrison & Goodfellow and Lloyd & Wood for appellant; Wilson & Wilson for respondent.

VANCLIEF, C.—On the twenty-third day of October, 1874, the plaintiff executed to Arthur W. Bowman a power of attorney authorizing him to transact her business generally and particularly; "to invest all and singular such sums of money as may be in his hands belonging to me, in such securities and upon such terms as he may think fit and for my interest; to sell, dispose of, transfer, and deliver all

[1] **Cited** in the note in 136 Am. St. Rep. 1030, on the duty of corporations to transfer stock on their books.

[2] **Cited** with approval in Mundt v. Commercial Nat. Bank, 35 Utah, 95, 136 Am. St. Rep. 1023, 99 Pac. 456, holding in effect that the corporation has nothing to do with the motives actuating the parties to the transfer, or with the consideration for it, unless upon notice given it, indifference to which must entail responsibility.

or any of my interests in the capital stock of any association, bodies corporate or politic, and to represent me and vote for me at any and all meeting or meetings of stockholders of any and all corporations in which I now or may hereafter hold or own shares of capital stock; and to represent me and my shares of stock aforesaid in all matters and things touching the said shares, and the acts and doings of the said corporations; also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with, goods, wares, and merchandise, choses in action, and other property in possession or in action; and to make, do, and transact all and every kind of business, of whatever nature and kind soever; . . . . giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present." This power of attorney continued in force until October 18, 1884, when it was revoked. On and prior to the twenty-third day of May, 1882, the plaintiff was the owner of two hundred shares of the capital stock of the defendant corporation, which stood in her name on the books of the corporation, and for which a certificate, numbered 31, had been issued to her. The defendant corporation was organized under the laws of the state for profit. Its by-laws, regulating transfers of stock, so far as relevant to this case, are as follows:

"Sec. 2. Every transfer of stock, or of the certificates above provided to be issued, shall be entered in the transfer books, to be kept by the secretary, by an entry showing to and by whom transferred, the numbers and designations of the shares, and the date of the transfer, and duly attested by the secretary. No transfer shall be valid except as between the parties, unless made as in this section provided.

"Sec. 3. The stock shall be transferable as in the last preceding section specified, and upon the books of the corporation, upon proper assignment and delivery to the assignee of the certificates above provided for. . . . .

"Sec. 4. The surrendered certificates shall in all cases be canceled by the secretary before issuing a new one in lieu thereof."

On the nineteenth day of August, 1882, A. W. Bowman presented to the secretary of defendant the certificate of stock No. 31, issued to the plaintiff as aforesaid, but not indorsed by her, or by any other person for her; and at the same time presented to the secretary said power of attorney from the plaintiff, and demanded a transfer to himself, in his own name, of the two hundred shares of stock represented by certificate No. 31, then standing in her name on the books of the company. The secretary then received from Bowman the certificate No. 31 without indorsement, canceled it, made the transfer on the books as requested, and, in lieu of certificate No. 31, issued to Bowman in his own name two certificates, for one hundred shares each, numbered, respectively, 211 and 212. At the time of this transaction the plaintiff was absent from this state, and actually knew nothing of it, and had authorized it in no other way than by said power of attorney.

On said nineteenth day of August, 1882, Bowman was largely indebted to divers persons in this state, and was then, and ever since has been, insolvent. Thereafter, for a valuable consideration, Bowman assigned and transferred said certificates, numbered 211 and 212, to the California Safe Deposit and Trust Company, a corporation, which took the assignment and transfer thereof in good faith, without notice of the rights of the plaintiff. Plaintiff had no notice of this transfer and assignment of certificates Nos. 211 and 212 until after they were made, and did not authorize the same, otherwise than by said power of attorney. Bowman was a director of the defendant corporation from January, 1882, until October, 1884. The defendant corporation never had any actual or presumptive notice that Bowman procured the transfer of said stock to himself for his own use, or that he intended to convert it to his own use, or to use it in any way prejudicial to the rights of the plaintiff, unless such notice may be presumed from the fact that he was one of the directors of the defendant corporation, as above stated. This action was brought by the plaintiff to recover from the defendant damages for an alleged conversion of said two hundred shares of stock; and the court found: "Eighth, that said defendant did, prior to the commencement of this action, convert and appropriate the said two hundred shares of stock of the de-

fendant, so belonging to plaintiff, and has wholly refused to return the same, or any part thereof, to plaintiff; and that, at the time of such conversion, the same was of the value of $10,000." Judgment was accordingly rendered in favor of plaintiff for $10,000 and costs. Defendant moved for a new trial, on the ground, among others, of insufficiency of the evidence to justify the decision. From the order denying a new trial, and also from the judgment, the defendant appeals.

Whether or not the evidence justifies the finding that the defendant converted the stock, as expressed in the eighth finding above set out, is the principal question to be decided. If that finding is justified by the evidence, the judgment and order should be affirmed; otherwise a new trial should be granted. After a careful examination of the evidence I am of the opinion that it does not warrant the finding that defendant individually, or jointly with Bowman, converted the stock in question. There is no evidence bearing upon this issue except the facts and circumstances above stated, which, I think, neither constitute nor substantially tend to prove a conversion by the defendant.

1. The defendant never took or had possession of the stock, or of the certificate which represented the stock, in any other way or sense than it took and had possession of all stock which it transferred upon the corporation books at request of a party to the transfer.

2. The defendant neither exercised, nor assumed to exercise, any dominion or control over the stock or the certificate; but simply recorded the transfer, canceled the old certificate (No. 31) and issued new certificates, as requested by Bowman.

3. The defendant corporation had no notice that Bowman intended to convert the stock, or to use it otherwise than as authorized by the plaintiff. Under the circumstances of this case, the fact that Bowman was one of the directors of the defendant corporation at the time of the transfer of the stock to him does not warrant the presumption that the corporation had notice of his intention to convert the stock to his own use. A director of a corporation is not disqualified to deal in its stock on his private individual account, or as agent for others. And when, in the course of such dealing, he requests a transfer of stock on the corporation books, notice of

his motives and intention in regard to such transfer is not to be imputed to the corporation, unless he also acts, or assumes to act, for the corporation in the same transaction: Morawetz on Private Corporations, secs. 527, 540b, 540c; Bank v. Whitehead, 10 Watts (Pa.), 397, 36 Am. Dec. 186, and authorities there cited in note; First Nat. Bank v. Gifford, 47 Iowa, 581; Blen v. Mining Co., 20 Cal. 614, 81 Am. Dec. 132; Lothian v. Wood, 55 Cal. 161. Bowman did not act for, or assume to represent, the corporation in the matter of transferring plaintiff's stock, wherein it appears that the corporation was represented by its appropriate officers for that purpose—its secretary and president—to whom Bowman exhibited plenary authority to represent the plaintiff.

4. That the certificate (No. 31) was not indorsed by plaintiff was not inconsistent with the right of Bowman to have the stock transferred to himself. His possession of the certificate, with a power of attorney from plaintiff authorizing him to transfer the stock, was prima facie evidence that he was at least the equitable owner: Ang. & A. Corp., sec. 564; Low. Tr. Stocks, secs. 43, 44; Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161; Boatmen's Ins. & Trust Co. v. Able, 48 Mo. 136; Broadway Bank v. McElrath, 13 N. J. Eq. 26; Scripture v. Soapstone Co., 50 N. H. 571; Baldwin v. Canfield, 26 Minn. 43. 1 N. W. 261, 276; State Bank v. Cox, 11 Rich. Eq. (S. C.) 347, 78 Am. Dec. 458.

5. The neglect of the secretary and president to require an indorsement of the certificate before transferring the stock does not tend to prove that defendant converted the stock, or aided Bowman's conversion of it. Section 1 of the by-laws provides that "such certificates shall be transferable by indorsement and assignment," and that "no transfer shall be valid, except as between the parties, unless made as in this section provided." We have seen that delivery of the certificate, with written authority to transfer the stock, is evidence of an equitable assignment, no written assignment by indorsement or otherwise being necessary. Besides, it was enough to justify the transfer that the assignment appeared to be valid between the parties thereto. This satisfies the by-law requirement of an assignment, in the absence of notice to the corporation that an assignment was not intended. The by-law requirement that the certificate should be indorsed

was for the benefit of the corporation, and was waived by the neglect of the corporation to demand or request it: Black v. Zacharie, 3 How. (U. S.) 513, 11 L. Ed. 690; National Bank v. Bank, 105 U. S. 217, 26 L. Ed. 1039; Isham v. Buckingham, 49 N. Y. 222. If, however, the plaintiff had any right of protection by this by-law, I see no reason why her action, through Bowman, whom she had authorized to transfer the stock, did not amount to a waiver of the indorsement by her. Had she appeared in person, and procured the transfer without indorsing the certificate, it would seem clear that she thereby waived the indorsement. Was not Bowman authorized to do all that she could have done in that behalf if personally present? But, however this may be, the mere neglect of the defendant to demand or procure the indorsement of the certificate was only nonfeasance, which of itself has never been admitted as evidence of conversion: 2 Greenl. Ev., sec. 642, and note. In this connection it should be observed that the gravamen of this action is conversion, and that negligence is neither alleged nor found: Doyle v. Callaghan, 67 Cal. 154, 7 Pac. 418.

6. It is true that defendant had notice of Bowman's relation to plaintiff as her agent, and also of his authority as such agent, so far as it appeared by the power of attorney. But such notice did not devolve upon the defendant the duty to seek, or inquire beyond what thus appeared, for the motives or intentions of Bowman, for the purpose of protecting the plaintiff from possible fraud or bad faith of her chosen and trusted agent, since it does not appear that defendant had any means of discovering Bowman's motives or intentions, other than to have inquired of him directly whether or not he intended, by the transfer, to defraud the plaintiff, which would have been, not only impertinent, but probably futile. The defendant was not a party to the transfer. Its function was simply ministerial, and its actions solely dependent upon the ostensible authority of Bowman to demand the transfer: Cook, Stocks, sec. 386; Helm v. Swiggett, 12 Ind. 195; Crocker v. Railroad Co., 137 Mass. 417; Brewster v. Sime, 42 Cal. 143. In Crocker v. Railroad Co., 137 Mass. 417, an executor had induced a corporation to transfer stock which belonged to the estate, and stood in the name of his testator, in fraud of the estate, by which the estate lost it, the corpora-

tion having notice of the representative character of the executor. The object of the action was to make the corporation responsible for negligence in transferring the stock under these circumstances. The court, by Morton, C. J., said: "If it [the corporation] issues a new certificate upon a forged or an unauthorized transfer, the real owner retains his property in the stock, and the corporation may also be liable to a bona fide holder of the new certificate. But, when a transfer by one who has the full power to transfer is presented, the corporation has the right to act upon it, and it is not its duty to inquire into the purposes of the parties, or to investigate the question whether the transaction is in good faith or is fraudulent." In Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, the headnote correctly expressed the substance of the decision of the chancellor, as follows: "A guardian having the legal power to sell or dispose of the personal estate of his ward in any manner he may think most conducive to the purposes of his trust, a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust; nor is he responsible for the faithful application of the money, unless he knew, or had sufficient information, at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was in fact, by the very transaction, applying it to his own private purpose": See, also, Albert v. Bank, 2 Md. 169; Hutchins v. Bank. 12 Met. (Mass.) 421; Ashton v. Bank, 3 Allen (Mass.), 222. In State Bank v. Cox, 11 Rich. Eq. (S. C.) 344, 78 Am. Dec. 458, it appears that Madam S., being the owner of fifty shares of stock in South Carolina State Bank registered in her name, and of which she held the certificate, delivered the certificate, without indorsement, to B., and at the same time executed to B. a power of attorney, authorizing him to transfer the stock. B. assigned the stock to Cox, and used the proceeds for his own purposes. Cox applied to the bank to have the stock transferred to him on the books of the bank, which was opposed by S. on the grounds that she had not indorsed the certificate; that B. had committed a breach of trust in assigning it, and converting the proceeds to his own use; and that B. was totally insolvent. The bank interpleaded the parties. Upon these facts, substantially, the chancellor decreed that the bank

transfer the stock to Cox, and in doing so said: "Whatever may have been the motive for the delivery of the certificate of stock and the power of attorney to B., she (S.) invested him (B.) thereby with all the indicia of property and ownership as to said shares of stock, and, if he abused her confidence, she must bear the consequences. [Page 349.] . . . . The evidence is plenary that, according to commercial usage, this possession of the certificate and a power of attorney in this form imported ownership. [Page 350.]" The court of appeals, in affirming this decree, said: "B. had been put in possession of this scrip, with an indefinite power of disposition, by S., and, if he was not the owner (of which ownership there is much evidence), she exhibited him in a light which enabled him to lay claim to the stock. Under such circumstances, equity would not permit her to avail herself of the dry skeleton of title, which yet stands formally in her name, to defeat him whom she has contributed to deceive. The transfer should have been formally made; and this court will not take notice of that as undone which ought to have been done": Id., p. 391.

If, according to the authorities above cited, the defendant may have looked upon Bowman as the equitable owner of the stock, by reason of his possession of the certificate, and his power to transfer the stock, it would follow that defendant had notice that, while Bowman was the authorized agent of the plaintiff to sell and transfer her stock, he had purchased the stock in question from his principal, as he unquestionably had a right to do, provided that he dealt with her fairly and honestly (Civ. Code, sec. 2230; Rubidoex v. Parks, 48 Cal. 215; Blockley v. Fowler, 21 Cal. 329, 82 Am. Dec. 747; Golson v. Dunlap, 73 Cal. 157, 14 Pac. 576); and it was not the duty of the defendant to inquire whether or not he had defrauded, or intended to defraud, his principal, that being a matter in which the principal and agent alone were interested. It did not concern third persons having no interest in the matter of the assignment or transfer of the stock; and such was the relation of the defendant to the transaction. On the presumption that the defendant knew the law applicable to the transaction, it can only be charged with notice that plaintiff could avoid the assignment as against Bowman, unless he

could prove that it was perfectly fair and honest; but such notice did not impose upon the defendant a duty to intervene between the parties, and object to the transfer, which, for aught that appears, may have been perfectly fair and honest. If this view of the transaction is correct, it follows that the defendant had no notice that Bowman, as agent for the plaintiff, assigned her stock to himself without her consent; and it is therefore unnecessary to decide what effect such notice, if given, would have had. "It is, however, of no consequence," says an author, "that the title of the purchaser is voidable, if it has not been, in fact, avoided; because, by the definition of the term 'voidable,' the title of the purchaser, in such a case, is valid until it is avoided": Low. Tr. Stocks, sec. 138.

I do not understand that it is contended by the learned counsel for respondent that the defendant converted plaintiff's stock otherwise than by aiding or assisting Bowman to convert it to his use alone; for it is not pretended that the defendant had or sought any use, profit, or advantage by the conversion; nor, as before remarked, does the evidence tend to prove that defendant had actual or constructive notice of Bowman's conversion, or of his intention to convert; and the only act by which it can be claimed that defendant, even unconsciously, aided or assisted Bowman to convert the stock, was the act of transferring it on the books of the company at Bowman's request; which request was ostensibly authorized by the plaintiff. I have found no authority for a constructive conversion upon facts similar to the facts of this case. Perhaps Dodge v. Meyer, 61 Cal. 405, may be regarded as furnishing a pattern of a cause of action for constructive conversion, with little, if anything, to spare. In that case, however, the defendant, Meyer, had actual notice of the intention to convert, and intentionally aided and assisted in the conversion for his own benefit. I think the plaintiff was the victim of her own trusted agent alone, and that the judgment and order should be reversed, and a new trial granted.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are reversed and a new trial granted.

In re MOORE'S ESTATE.

No. 13,139; November 20, 1889.

22 Pac. 653.

Administrators—Delay and Neglect of Duty.—The fact that an administration has not been completed, though fourteen years have elapsed since the appointment of the administrator, is prima facie evidence of neglect of duty on his part, and, in the absence of satisfactory explanation of the delay, supports a finding that the administrator has wrongfully and willfully neglected the estate, and has unnecessarily, willfully, and wrongfully prolonged its administration, to its great detriment, and justifies his removal, and the revocation of his letters of administration.

APPEAL from Superior Court, Santa Clara County; Phil W. Keyser, Judge.

This proceeding to obtain the removal of Thomas W. More as administrator of the estate of William H. Moore, deceased, was instituted in the superior court of Santa Cruz county by W. H. Moore, a son and heir at law of the decedent, but was subsequently removed to the superior court of Santa Clara county.

Hall & Rodgers (Warren Olney of counsel) for appellant; Charles B. Younger for respondent.

PER CURIAM.—This appeal is from an order removing appellant, and revoking his letters of administration, as administrator of said estate. Said order is based upon a finding that "the said Thomas W. Moore has wrongfully and willfully neglected said estate, and has unnecessarily, willfully, and wrongfully prolonged the administration of said estate, and to the great detriment thereof." The question whether the finding is justified by the evidence is the only one which we shall now consider.

It clearly appears that appellant was appointed and entered upon the discharge of his duties as administrator of said estate in the early part of the year 1873, and the petition for his removal was filed July 14, 1887. Between the appointment and the filing of the petition more than fourteen years

had elapsed. This was prima facie evidence of neglect, and we fail to find any satisfactory explanation of this long delay consistent with the duty of the administrator to wind up the administration within a reasonable period. The power of removal for the cause specified is vested in the superior court; and "with the exercise of this power, so necessary to the protection and security of estates, an appellate court should not interfere, unless it be clearly shown that there had been a gross abuse of discretion by the probate court. The facts of this case, as disclosed by the record, establish no such abuse of discretion": Deck's Estate v. Gherke, 6 Cal. 666. Order affirmed.

STANLEY et al. v. McELRATH.*

No. 12,187; November 27, 1889.

22 Pac. 673.

Judicial Notice—Judgments.—Code of Civil Procedure, section 1875, subdivision 3, providing that courts may take judicial notice of "public and private official acts of the . . . . judicial department of this state," does not authorize a court to dispense with formal proof of its judgment in another cause.

Bills and Notes.—In an Action Against the Maker of a Note for the amount paid thereon by the indorser, it is no defense that the indorser paid it without proper demand and notice; for, as these are for the benefit of the indorser, he may waive any defects therein.

Bills and Notes.—The Execution by an Indorser of His Own Note, which is given and accepted in full payment of the note on which he is liable as indorser, constitutes a novation under Civil Code, section 1530, providing that "novation is the substitution of a new obligation for an existing one," and is made (section 1531) "by the substitution of a new obligation between the same parties with intent to extinguish the old obligation"; and the maker of the first note becomes liable to the indorser, though the holder, instead of canceling it, indorsed it without recourse to the indorser.

APPEAL from Superior Court, City and County of San Francisco.

*For subsequent opinion in bank, see 86 Cal. 449, 25 Pac. 16.

Wm. H. Fifield for appellant; Henry N. Clement for respondents.

GIBSON, C.—This action was brought by C. M. Hitchcock, who has since died, to recover from the defendant the sum of $6,136.50, with interest, on account of the payment, for and on behalf of the defendant, of a certain promissory note made by him on February 11, 1879, for $4,500, with interest, payable to the order of Hitchcock, at the London & San Francisco Bank, Limited, on April 11, 1879, and which note he (Hitchcock) indorsed solely for the accommodation of defendant, who thereupon negotiated it to the said bank, and received the full amount of note in money for his own benefit, and then at maturity let it go to protest for nonpayment. Subsequently, when the statute of limitations had about run against the note, Hitchcock paid it by giving his own note to, and which was received by, the bank in full satisfaction and payment of the protested note, which was by the bank indorsed without recourse, and surrendered to Hitchcock. Defendant, by his answer, admitted the making, indorsement, and negotiation of the note, but denied that Hitchcock was an accommodation indorser thereon to any greater extent than $3,631.28, and averred that the remaining $868.72, at the time the note was negotiated, was due from him to the defendant on account of a certain note, theretofore made by Hitchcock in favor of defendant, and by the latter negotiated to the above-named bank, and afterward by him paid to the bank. He also denied that the note was protested; that notice thereof was given to plaintiff; and that Hitchcock paid the note; and claimed the said sum of $868.72 as an offset, and the further sum of $4,000 for services rendered as an attorney to Hitchcock, by way of counterclaim.

The complaint is sufficient to sustain an action by plaintiff, either for money paid out to the use of defendant, or upon the note as an equitable assignee thereof. The trial resulted in a denial of the offset and counterclaim of defendant, and a judgment against him for the full amount of plaintiff's demand. The appeal is from this judgment, and an order denying a new trial.

The appellant urges as the principal reasons why his appeal should be sustained—First, that there is no evidence to sup-

port the findings in which his offset and counterclaim are disallowed; second, that his note was not legally protested, and hence Hitchcock could not be held as an indorser and had no right to pay the note, but, having paid it, he acted as a volunteer and could not recover of the appellant—the maker of the note; third, that Hitchcock's note, given to and accepted by the bank in payment of appellant's note, did not and could not constitute such a payment as entitled Hitchcock to recover therefor.

(a) The court found that it was not true that Hitchcock was an accommodation indorser only to the extent of $3,631.28 of the amount of the note, but that he indorsed the note wholly for the accommodation of appellant; and, further, that the offset and counterclaim could not be allowed, because they had formed the basis of separate actions prosecuted by the appellant, as plaintiff, against Hitchcock in the same court in which the action was tried, and which had been fully adjudicated. Respondents concede that there is no evidence in the record to show such adjudication, but in support of the findings argue that, as the claims were adjudicated in the same court, under section 1875 of the Code of Civil Procedure, which permits the courts of this state to take judicial cognizance of certain matters without formal proof, the trial court properly dispensed with formal proof of its own records showing the adjudications, and took judicial notice of them for the basis of its findings. The method suggested would be an easy one for supplying proof of a judgment, and, if it could prevail, would place all judgments in the same court beyond the reach of inquiry as to their reliability, since what a court can judicially notice in a case cannot be overcome by evidence. The scope of the above code provision was evidently misapprehended, for while the court could take judicial notice of (subdivision 3) "public and private official acts of the legislative, executive, and judicial departments of this state and of the United States," it could not dispense with proof of such judicial acts as might be in judgments. For example, we know judicially that the superior court, from whence this appeal came, is divided into twelve departments, and that a judge presides in each, but we cannot know without competent proof what the judicial acts of the several judges may be. Thus said this court in People v. De La

Guerra, 24 Cal. 73: "In the trial of one case the court can no more take judicial notice of the record in another case in the same court without its formal introduction in evidence than if it were a record in another court; much less can this court take notice of the existence of a record not introduced in evidence in the court below." To the same effect is Lake Merced Water Co. v. Cowles, 31 Cal. 215. This error alone, if it does not affect the merits of the case, will not warrant a reversal, because it is a well-settled rule that a judgment which is sustained by the record will not be reversed because one of the reasons upon which it is based is erroneous: Kidd v. Teeple, 22 Cal. 255; Webster v. King, 33 Cal. 348; Helm v. Dumars, 3 Cal. 455. As the appellant did not, at the trial, adduce any evidence in support of his affirmative defenses, he therefore failed to establish them; and the court properly found against them, although for an erroneous reason. It is therefore obvious that, as the findings were justified, the reason is immaterial, and did not affect the merits of the case.

(b) A promissory note may be protested in this state: McFarland v. Pico, 8 Cal. 626; Kellogg v. Box Factory, 57 Cal. 327. And when protested, the protest is prima facie evidence of the demand, nonpayment and notice to any or all of the parties to the note: Pol. Code, sec. 795. "But," said this court in Kellogg v. Box Factory, "it is not necessary, in order to fix the liability of indorsers, that a note should be protested for nonpayment. A presentation of it to the maker upon the day of its maturity for payment, a refusal by him to pay it, and notice to the indorsers of such presentation and refusal, are sufficient."

The present case, however, illustrates the convenience of a protest, at least to banking institutions. The note was payable at the London & San Francisco Bank, Limited, which was at the same time the holder of the note. Now, to avoid making a demand upon itself, and a refusal of payment for lack of funds in its hands belonging to the maker of the note, it called in a notary for its convenience, whom it constituted its agent to make the necessary demand of payment at the bank, and who was authorized to place the dishonor of the note in a form that would constitute prima facie evidence thereof. The convenience of a notary in this respect was recognized by Story, J., as long ago as 1822, in Nicholls

v. Webb, 8 Wheat. 326, 5 L. Ed. 628. Hitchcock, as indorser, was entitled to notice of the dishonor of the note, but as it was for the benefit of himself and the holder, and not for that of the maker, he could waive it, if he saw fit to do so: Civ. Code, sec. 3135, subd. 1; 2 Daniel, Neg. Inst., sec. 1090. In Curtis v. Sprague, 51 Cal. 239, which was an action upon a note against the maker and an indorser, who was treated as a guarantor, the latter having promised to pay the note after maturity, and with full knowledge that the holder had failed to make a demand of payment, and give notice of nonpayment, the court said: "It is well settled that a promise by an indorser or guarantor, after maturity, to pay the note, with notice of the laches, dispenses with the necessity of proving demand and notice." This rule is almost universal wherever the law-merchant prevails: Daniel, Neg. Inst., sec. 114; Story, Prom. Notes, sec. 274. So, if a notice may be completely waived by an indorser, or entirely dispensed with by his promise to pay after maturity, it is plain that he may determine whether he will treat a notice that may be imperfect as sufficient or not. Hence, as Hitchcock brought into court at the trial one of the duplicate notices of dishonor, made out and sent to him at two different places by the notary, it is evident that he at some time received the one he produced. Whether he received it in time was for him, not the maker to determine. That he (Hitchcock) considered that the notice was in time, and effectual, may be inferred from the fact that he never questioned it; but with a knowledge of its defects, if any existed, at all times afterward admitted his liability upon the note, and subsequently, and just before the statute of limitations had fully run against it, paid it. If no demand and notice had been given, and the indorser voluntarily paid the note at any time before it became barred, how could the maker be injured? He is the one that is primarily liable, and it matters not whether he is compelled to pay to the holder in the first place, or to his accommodation indorser, after the latter has paid the holder of the note, in the next place.

The plaint of the maker of the note in this case, that notice of dishonor was not given to his accommodation indorser, does not come with as good grace as it might from an indorser whom the indorsee was seeking to hold in an action upon the

note, wherein it would be incumbent upon the plaintiff to prove a proper demand and nonpayment and notice in order to hold him. Here the indorser admitted the receipt of notice and the demand, the latter being undisputed, and acted upon them, besides, in paying the note, as he had a right to do at any time before it was barred. Besides, it seems the appellant at one time was satisfied with the manner in which the notice of dishonor was given, and the consequent liability of Hitchcock, as he, several times after the dishonor of the note, promised both the bank and Hitchcock that he would pay it, and did make several small payments to the bank on account of interest. Therefore the findings in this respect are fully sustained by the evidence.

(c) "Novation is the substitution of a new obligation for an existing one" (Civ. Code, sec. 1530); and it is made "by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation": Id., sec. 1531. This is in accordance with the Roman law upon this subject; and, says Judge Story in his work on Promissory Notes, section 105: "It shows that common sense, in its application to the every-day transactions of human life, speaks the same language, and is regulated by the same motives of convenience and policy and justice, in all civilized countries, however wide their distance or remote their ages from each other. Thus we are told in the Institutes that the ancient lawyers at Rome held that a novation—the substitution of a new debt for an old one, thereby extinguishing the former—(Evans, Poth. Obl., marg. p. 546; Dig. Lib. 46, tit. 2, c. 1) arose when a second contract was intended to dissolve a former." And again, in section 438: "A negotiable promissory note will, by our law, operate as an extinguishment of a prior existing debt if it is so intended between the parties. The only question is as to the proof of such intention." Applying this doctrine in this case, the testimony of Hitchcock, the indorser of the note, and that of Scrivener, the managing agent of the bank that held the note, indisputably shows that the note of Hitchcock was given and received in absolute extinguishment of the latter's liability as indorser upon the appellant's note. Hence, as between Hitchcock and the bank, the appellant's note was fully paid, and a novation was thereby perfected between Hitchcock and the bank.

It makes no difference to the appellant, that we can perceive, that the bank, instead of canceling the note, indorsed it without recourse to Hitchcock, because between him and the maker he, as an accommodation indorser, stood toward the bank as a surety for the maker. Therefore the appellant, as principal debtor, was bound to reimburse his surety for his disbursements in satisfaction of the note, including necessary costs and expenses: Civ. Code, sec. 2847. See Waldrip v. Black, 74 Cal. 409, 16 Pac. 226, and Fowler v. Strickland, 107 Mass. 552. In the first case Waldrip signed a note as surety for and with the two defendants, they having executed a mortgage on realty to secure him against possible loss. He was compelled to pay the note to the holder, who, upon such payment, indorsed the note to Waldrip. The latter, to obtain reimbursement, brought suit upon the note against the makers, and to foreclose the mortgage. Held that, having paid the note, he became the equitable assignee thereof, and was entitled to enforce it as the holder thereof, as well as to foreclose the mortgage as collateral security.

In Fowler v. Strickland, which was similar to the present case, the note for $2,000 sued on was an accommodation note, made by the defendants to the plaintiff, as payee, who indorsed it for the accommodation of the defendants. They, defendants, thereupon negotiated it to one Loomis for the full amount of the note, and the plaintiff, as such indorser, thereby became liable for such amount in an action on the note by Loomis or other lawful holder. At the maturity of the note one of the defendant makers of the note informed the plaintiff that they would be unable to meet the note, and the plaintiff would be obliged to pay it. Soon after, the plaintiff took up the note by giving Loomis, the holder, in payment three promissory notes, signed by himself and another person, aggregating $700, and nothing further. The court, by Gray, J., held that "the plaintiff had the same right as any other person to purchase the note from Loomis for such price as might be agreed on between them. Even if, by the terms of such an agreement, Loomis had retained any interest in the proceeds of the note which he delivered to the plaintiff, the latter, in an action against the defendants on the note, could have recovered the full amount thereof, although he might have held a part of the proceeds in trust for Loomis. If he

purchased the entire interest of Loomis in the note at the time of its delivery by Loomis to him, he might recover the whole amount to his own use. The defendants, having received the whole amount of the note at the time of its original negotiation, and being now no longer liable to any action by Loomis, the amount of their liability in this action against them as makers of the note is not affected by the question of how much the plaintiff paid to Loomis, or whether the sum recovered will belong to Loomis or to the plaintiff." Of what concern, then, is it to the appellant here whether Hitchcock's note is ever paid or not? It ought to be sufficient for him to know that it relieved him of his responsibility to the bank upon his own note, of which he received the fruit. At one time, as we have seen, he was satisfied of the liability of his indorser upon the notice of dishonor, which he now strenuously seeks to avoid on this appeal.

Our conclusion is that, whether we regard the action as one upon the note by an equitable assignee, or one for money paid to the use of the defendant, the liability of the appellant in either case is manifest from the evidence; and, as there is no prejudicial error in the record, the judgment and order ought to be affirmed.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

BATES v. GREGORY et al.*

No. 13,168; November 30, 1889.

22 Pac. 683.

Municipal Bonds—Subsequent Statute Affecting Purchasers.—Act of March 26, 1851 (Stats. 1851, p. 391), incorporating the city of Sacramento, and investing it with authority to sue and be sued, and acts of April 26, 1853 (Stats. 1853, p. 117), and April 10, 1854 (Stats. 1854, p. 196), authorizing the issuance of bonds of the city,

*For subsequent opinion in bank, see 89 Cal. 387, 26 Pac. 891.

gave the purchaser of such bonds the right to sue the city if they were not paid when due; and this right could not be impaired by subsequent legislation.

Municipal Bonds—Funding—Limitation of Actions.—Act of March 22, 1864 (Stats. 1864, p. 217), entitled an "Act to provide for the liquidation of the indebtedness of the city of Sacramento which accrued prior to January 1, 1859," and empowering the board of trustees of the city to issue new bonds, in liquidation, to all holders of claims against the city, was passed merely for the purpose of completing the funding of the city's indebtedness, and did not withdraw claims, existing before the passage of the act, from the operation of the statute of limitations; and an action for mandamus to compel the board of trustees to issue bonds, as therein provided, in place of those issued by the city under acts of April 26, 1853, and April 10, 1854, cannot be maintained where such bonds have since the act of 1864 become barred by the statute of limitations.

Thornton, J., dissenting.

APPEAL from Superior Court, Sacramento County; John Hunt, Judge.

A. C. Freeman and W. C. Belcher for appellant; A. P. Catlin for respondents.

FOX, J.—This was an application for a writ of mandate to compel the defendants, as trustees of the city of Sacramento, to issue to petitioner new bonds of the city in accordance with the provisions of the act of March 22, 1864, in exchange for unpaid bonds held by him, which were issued under the provisions of the acts of April 26, 1853, and April 10, 1854. The defendants, in their answer, and upon the trial, contended that the claims were stale, and barred by the statute of limitations. This contention prevailed, and resulted in a judgment for the defendants, from which, and an order denying a new trial, plaintiff appeals.

March 26, 1851, the city of Sacramento was incorporated by an act of the legislature, passed on that date, entitled "An act to incorporate the city of Sacramento": Stats. 1851, p. 391. By this act the government of the city was placed in the hands of a mayor, recorder, and a common council, who were constituted a body politic under the name of the "Mayor and Common Council of the City of Sacramento," with authority to sue and be sued; to borrow money, and pledge

the faith and credit of the city therefor; and to levy and collect taxes. April 26, 1853, another act was passed entitled "An act to extend and better define the powers and duties of the common council of the city of Sacramento, and to authorize the establishment of free schools in said city" (Stats. 1853, p. 117), which conferred upon the mayor and common council the power to issue bonds for the purpose of raising funds to pay the then existing indebtedness of the city. In the exercise of the power thus granted, the mayor and common council of the city of Sacramento issued a certain bond dated the sixth day of May, 1854, and numbered 418, for the sum of $544.45, and made payable to Jonathan Williams or bearer on the first day of July, 1874, unless sooner called in, together with forty semi-annual coupons thereto attached for $27.22 each. Another act was passed April 10, 1854, entitled "An act authorizing the mayor and common council of the city of Sacramento to issue bonds for certain purposes" (Stats. 1854, p. 196), under which the mayor and common council of the city of Sacramento issued two certain bonds for the sum of $1,000 each, respectively numbered 361 and 384, and dated 24th and 26th of April, 1854; and attached to each bond were forty semi-annual coupons for $50 each. Both bonds were made payable on the first day of July, 1874, unless sooner called in. Bond No. 361 was made payable to Edward McGowan or bearer, and No. 384 to Stow and English or bearer. April 24, 1858, another act was passed, which consolidated the city of Sacramento with the county, under the corporate name of the "City and County of Sacramento." This act vested all the revenue and property of the city of Sacramento in the consolidated government, and provided for the funding of all claims existing against the city on the first day of January, 1859, and fixed the time at June 1, 1859, within which the holders of such demands might present them for funding. This time was thereafter extended to the first day of October, 1859 (Stats. 1859, p. 359), and subsequently to January 1, 1862 (Stats. 1861, p. 308). April 25, 1863, an act entitled "An act to incorporate the city of Sacramento" (Stats. 1863, p. 415) was passed, creating the present "City of Sacramento." This last act provided, among other things, that all the property and revenue which belonged to the mayor

and common council of the city of Sacramento on the thirtieth day of April, 1858, should become the property of the city of Sacramento, and that it should have power to sue and be sued, and defend, upon any obligation; provided, that such obligation was not made or entered into prior to the passage of the act. On the twenty-second day of March, 1864, an act was passed entitled "An act to provide for the liquidation of the indebtedness of the city of Sacramento which accrued prior to January 1, 1859" (Stats. 1864, p. 217). By this last act the board of trustees of the city were empowered to issue to all holders of claims against the city which accrued prior to January 1, 1859, bonds payable to bearer on February 1, 1903, to bear date of May 1, 1864, and bear interest from January 1, 1859, at six per cent per annum, payable annually, after the first six years, on the first day of January, at the office of the city treasurer. The act prescribed no time within which creditors should present their demands for liquidation, but provided that bonds should be issued for all claims which accrued prior to January 1, 1859, that the board of trustees, upon examination, should consider "legal and just."

The petitioner, on October 17, 1887, presented the three bonds above described to the defendants for funding, and demanded in lieu thereof, under the act of 1864, the issuance of bonds to him equal in amount to the principal and interest due on the bonds which he offered to surrender. This demand was refused by the defendants. The appellant, upon these facts, argues that the statute of limitations was suspended by the acts of 1858, 1863, and 1864, as to all persons holding claims who might choose at any time to accept their provisions; and that the act of 1864 is a continuing offer held out to the creditors of the city of Sacramento which can only be withdrawn by a repeal of the act; and all who have claims such as are mentioned in the act, and accept its terms, can enforce the funding of their obligations by mandamus. It is conceded by respondents that mandamus is the proper remedy, if the claims of the petitioner are not stale or barred.

The act of incorporation of the city of Sacramento of 1851, and the acts of 1853 and 1854, under which the bonds of petitioner were issued, expressly authorized suits against the corporation upon such obligations. The inhibition of the act

of 1858, in the first section thereof, is that "the city and county shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final"; and that prescribed in the first section of the act of 1863 is that the city may "sue and be sued, and defend, upon any bond, covenant, agreement, contract, matter, or thing whatever, of which courts of law or equity have jurisdiction: provided, however, that such bond, covenant, agreement, contract, matter, or thing that is the cause of action has been made or entered into after the passage of this act." These inhibitions clearly applied only to obligations of the city and county and city respectively, incurred after the passage of the several acts. The restriction in the first act was to prevent the city and county of Sacramento from being sued upon any obligation incurred by it as such; and that in the second act, to protect the city of Sacramento against suits upon claims for which the former city and county had alone become liable. The act of 1864 did not enlarge or affect these restrictions in any way. The rule is, as stated by Judge Dillon in his work on Municipal Corporations (volume 1, section 69), that "if a municipal corporation becomes indebted, the rights of the creditors cannot, it is clear, be impaired by any subsequent legislative enactment": Meyer v. Brown, 65 Cal. 583, 4 Pac. 25, 625, 26 Pac. 281. The bonds of petitioner were issued under the acts of 1853 and 1854, under which the city could sue and be sued, and the privilege to sue thereby became a part of and entered into the contract of the city with the holders of such bonds. Petitioner's bonds are therefore within the above rule, and the protection of the state and federal constitutions, which prohibit the passage of laws impairing the obligations of contracts; therefore the right to recover upon the bonds by suit after they matured remained unaffected by the acts of 1858 and 1863. If, however, the petitioner had surrendered his bonds under the acts of 1858 or 1864, in exchange for those provided for in said acts, the inhibition against suing thereon, contained in the act of 1858, would have become as much a part of the new contract thus created as the privilege to sue granted by the acts of 1851, 1853, and

1854 did of the bonds in question here: Kennedy v. City of Sacramento, 10 Saw. 33, 19 Fed. 580; Meyer v. Porter, 65 Cal. 67, 2 Pac. 884; and Meyer v. Brown, supra.

The claim of petitioner, that the act of 1864 was a continuing offer which he could take advantage of at any time before such offer should be withdrawn by repeal, cannot be supported. The purpose of the legislators in passing the act of 1864 was merely to complete the funding of the city indebtedness, not to withdraw claims founded on such indebtedness from the operation of the statute of limitations. This is manifest when the act is construed in connection with the legislation bearing on the same subject, beginning with the act of 1858; all of which show a complete plan to fund and adjust certain indebtedness of the city. As an inducement for its creditors to co-operate with it in the accomplishment of this object, the act of 1858 held out the opportunity, if taken advantage of before June 1, 1859, subsequently extended to January 1, 1862, to obtain bonds in exchange for the old ones, in one of four classes, that would run, respectively, until 1888, 1893, 1898, and 1903, dependent upon the order of issuance. These bonds would run from fourteen to twenty-nine years longer than the old bonds, and would draw interest at the rate of six per cent per annum, payable annually, and carried with them the pledge of an annual tax for municipal purposes, and an interest and sinking fund to pay the interest on the bonds as it accrued, and to effect the redemption of the bonds at maturity. The same opportunity was again renewed by the act of 1864, except that all new bonds issued thereunder were to run until 1903, or twenty-nine years longer than the bonds held by petitioner; and the interest would be payable from January 1, 1859, and annually after the first six years. The benefit of the interest and sinking fund was a material advantage that could be gained by a surrender of the old bonds, as they were mere naked promises to pay, for which the general faith and credit of the city alone was pledged, and upon which the payment of interest stopped in 1858; no provision for the payment thereof having been made in the act of 1858, or any subsequent legislation, which we think is a circumstance showing a desire on the part of the legislature to compel creditors to fund their claim. Therefore, to say that the act of 1864 was intended

to withdraw all claims therein mentioned from the operation of the statute of limitations would be to ignore the object of the legislation referred to, and encourage the holders of such claims to defeat the efforts of the city to adjust and fund its indebtedness. Besides, as the bonds of petitioner had yet ten years to run before maturing, when the act of 1864 was passed, there was no necessity for a suspension of the statute of limitations; and, aside from what seems to us to be the object of the act, it is not reasonable to impute to the legislators who passed it an intention to provide for a necessity which did not exist, when they failed to give any expression in their act from which such an intention might be inferred. Again, it is a well-settled rule that the repeal of statutes by implication is not favored, and we are of the opinion that the same principle should apply with equal force to the suspension of the operation of statutes. It was, of course, optional with the petitioner to exchange the bonds or not; but having refused to exchange them from 1858 to 1874, and waited thirteen years longer before offering to do so, his right to have his bonds funded is now barred, if it is within the provisions of sections 337 and 338 of the Code of Civil Procedure, pleaded in defendant's answer to his petition.

The Code of Civil Procedure (section 337) provides that an action must be commenced within four years "upon any contract, obligation, or liability founded upon an instrument in writing executed in this state." When petitioner, by his assignors, accepted the bonds from the city of Sacramento, a contract was thereby created between them whereby the city became obligated to pay the principal and interest of the bonds on or before the first day of July, 1874. This contract, it will be observed, was in writing, and was evidenced by the bonds. The right to maintain an action upon the bonds after July 1, 1878, four years after the maturity thereof, therefore depended upon whether the plea of the statute of limitations would be made. The statute of limitations is a personal privilege that may be used as a means of defense by pleading it; otherwise, it is waived: Grant v. Burr, 54 Cal. 298. In this case this defense was not waived, the defendant having specially pleaded the bar of said section 337, and it constitutes a complete defense to this action. It fol-

lows that the judgment and order appealed from must be affirmed. So ordered.

We concur: McFarland, J.; Sharpstein, J.; Works, J.; Paterson, J.

Beatty, C. J., took no part in the decision of the above cause

THORNTON, J.—I dissent. The proceeding herein is not barred by the statute of limitations. The Code of Civil Procedure classifies the procedure in this case as a special proceeding of a civil nature: See Code Civ. Proc., pt. 3, p. 371. The contents of the page just cited are a part of the code (Sharon v. Sharon, 75 Cal. 16, 16 Pac. 345), and define the character of the procedure mentioned in part 3 of the Code of Civil Procedure. The right to commence this proceeding did not exist until a demand was made for the issuance of bonds to the petitioner, and its refusal by the board of trustees of the city of Sacramento. The demand and refusal were made but a few days before this proceeding was begun. No statute of limitations that we know of effected a bar herein. Nor were the bonds of a former issue held by petitioner barred by the statute of limitations. This was, in fact, determined by the case of Underhill v. Trustees, 17 Cal. 177, which applies with all its force to this case. The court, in its opinion, by Baldwin, J., states the case in relation to the defense of the statute of limitations, and disposes of it. The court said: "The important question is that arising under the statute of limitations. The bonds upon their face are payable at dates which show a bar under the general statute. But the plaintiff, to avoid the bar, sets up several acts of the legislature applicable to this corporation, which he alleges are sufficient to take the case from the influence of the statute. The bonds are dated 25th of March, 1853, and due two years afterward. The first of these acts was passed March 9, 1855, and is entitled 'An act to reincorporate the city of Sonora'; at this time the bonds were not barred. The tenth section provides that the trustees shall have power, and it shall be their duty, semi-annually to raise, by tax on the real and personal property within the city, a revenue of one per cent, etc.; and section 16 provides: 'In case the public debt is not liquidated at the expiration of three years, the trustees shall have power

to levy a sufficient tax, in addition to the one per cent authorized in section 10, to pay the outstanding debt.' The second section of the act of 1858 is in the same words, except that six years are specified instead of three. It is contended that this is not only a recognition of the existence of these debts by the legislative authority, but a provision for their payment. This provisional office of levying the tax, being a public duty of the officers of the corporation, cast upon them by the public law, carried with it a legal obligation to discharge it, which might doubtless have been enforced by appropriate proceedings. It afforded, in other words, a remedy to the bondholder for the enforcement of the claim as a valid money obligation. These acts were passed at the instance of the corporators, according to the averments of the complaint. With the assent of the city, this legislative recognition and provision are equivalent to the same acts done with full authority by the corporation. Indeed, we suppose they would be sufficient without such assent, by virtue of the control which the legislature possesses over these municipal bodies. The legislative acts, then, recognize the debt, and make provision for its payment. This is enough to withdraw the case from the operation of the statute. It is equivalent to a trust deed by the city, setting apart property out of which the money due was to be paid at a given time, if not sooner paid, upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute merely because the creditor waited after this for his money. The plea of the statute, if successful, would, under these circumstances, be nothing less than an act of unqualified repudiation of a just and honest obligation, to the payment of which the faith and honor of the defendant are pledged. The respondent suggests, in justice to the city, that she is equitably entitled to set up this defense. We think the equities of the case, if there be any—of which we cannot now judge—must be set up in some other form."

It has long been settled in this state that municipal corporations, of which the city of Sacramento was and is one, are parts of the state government, and entirely under the control of the legislature. The latter proposition here stated

was broadly true under the former constitution of this state, during the existence of which the acts of the legislature referred to in this case were passed. Important restraints on the legislative power were made in the present organic law; but they have no bearing on the question before us, the acts having been passed long before the present constitution went into effect. As to the nature of a public municipal corporation, I refer to Payne v. Treadwell, 16 Cal. 220, where the subject is fully and ably discussed. Many cases subsequently decided approved the rulings there made, which can easily be found by anyone familiar with the reports of the decisions of this court. It is no longer a debatable question with us that a municipal corporation can be a trustee. It is in its essence a trustee of public trusts. The acts of the legislature concerning the indebtedness of Sacramento, providing for its funding, refunding and payment, create a trust for the benefit of its creditors. The trust was an express one. It created a fund for the payment of creditors, the proper administration of which can be enforced, and should be enforced, in its letter and intent by the courts of the state. It is unnecessary to recapitulate the provisions of that statute. They have been fully and frequently stated in former decisions of this court. The statute of limitations never runs against an express trust until the repudiation of the trust by the trustees. This is settled law in this state. The cases which sustain this proposition are numerous. They may be found cited and commented on in any work on the statute of limitations: See Ang. Lim., secs. 166, 168, 169 et seq., 468, 469 et seq., where the cases are cited and fully discussed. See, also, Wood, Lim., in index, word "Trusts," where the text is referred to, in which the cases are cited and discussed. A common mode of creating express trusts is seen in the cases of executors and administrators: Ang. Lim., sec. 168. The retention of funds by them is consistent with their character, and they may be held to answer after a long period: Sec. 168. The devise of land to trustees or executors is a direct trust, and the statute does not run after the testator's death: Ang. Lim., secs. 169, 468. Instances of express or direct trusts are also seen in the case of assignees in bankruptcy, who are trustees for creditors: Wood, Lim., p. 420, sec. 202, and cases cited. See In re Leiman, 32 Md. 225,

where the rule is elaborately discussed. Other instances might be referred to, but the foregoing are deemed sufficient.

The trust in this case has never been, and it is confidently asserted cannot and should not be, repudiated. Nor is the trust a stale one. It is a continuing trust, lasting at least until 1903. That such a trust can be stale is a delusion. The decision in Underhill v. Trustees, 17 Cal. 173, is in line with the cases above referred to, and was ruled on the same principle. Where a direct trust is created, the trustee can only set the statute into action by repudiating the trust. The statute only commences to run from some unequivocal act of repudiation, and there is none such here. If there was an attempt to repudiate the trust as to the bonds involved in this proceeding, it occurred only a short time before it was commenced, and a sufficient time had not then elapsed to effect a bar. It should be observed that the acts of the legislature under which this funding was had abolished the corporation of the city of Sacramento, and created a new one entitled the "City and County of Sacramento." All the assets of the old were transferred by the acts referred to to the new corporation, and the creditor was forbidden to sue the new corporation on any of the old indebtedness, like that of petitioner here. Instead, he was permitted to fund his claims; to obtain new bonds for old. The old corporation had gone out of existence by a valid legislative enactment, and it is difficult to perceive how it could be sued. Can a nonexistent corporation be sued? It would seem not. A corporation is a person—an artificial one—and, if it has ceased to exist, it cannot be sued any more than a dead man can. It has met its death, and persons who have ceased to live are not judicial persons. They have no longer standing in a court of justice. Inasmuch as the old corporation had died, and the new one could not be sued by the petitioner on his own bonds, it would be highly unjust to hold it to be law that the statute of limitations ran against him on such bonds; but, whether he could sue or not, we have shown that by the operation of the acts of the legislature the statute did not, and could not, run on these old bonds against the creditor now asking the interposition of the court.

It may be contended that the writ of mandate is, with us, one retaining its character as a prerogative writ, to be issued

only in the sound discretion of the court (so held in Spring Valley Waterworks v. San Francisco, 52 Cal. 117); and that in the exercise of such discretion it should not issue in this case, for the reason that the petitioner has waited so many years before applying to exchange his bonds for new bonds to be issued under the act or acts of the legislature referred to by counsel. To the ruling in the case cited, as to the nature of the writ of mandate, Justice Rhodes refuses to accede, for reasons which seem to me very cogent. But it will be here conceded that the decision in 52 Cal. is correct. I think that for sound and controlling reasons this court is called on to so exercise its discretion as to order the issuance of the writ asked for herein, although the bonds presented by the petitioner were issued in 1854. The discretion referred to is a judicial discretion. As said by Lord Mansfield in Rex v. Wilkes, 4 Burr. 2539: "Discretion, when applied to a court of justice, means sound discretion, granted by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular." Lord Kenyon, in Wilson v. Rastall, 4 T. R. 757, thus characterizes it: "The discretion to be exercised . . . . [by a court or judge] is not a wild, but a sound, discretion, and to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself." Wallace, J., speaking for the court in Ex parte Hoge, 48 Cal. 5, says of this discretion: "This 'discretion' to do 'justice' is not an arbitrary discretion to do abstract justice, according to the popular meaning of that phrase, but is a discretion governed by legal rules, to do justice according to law, or to the analogies of the law, as near as may be": 48 Cal. 5, 6. In Lybecker v. Murray, 58 Cal. 186, it is said: "Under no circumstances is the discretion of the court to be exercised arbitrarily, but it is a discretion governed by legal rules, to do justice according to law, ... as near as may be"; citing Ex parte Hoge and Ex parte Marks, 49 Cal. 681. See, also, People v. Lewis, 64 Cal. 401-403, 1 Pac. 490. It will be observed that there is no such thing as arbitrary discretion in the administration of the law vested in courts of justice. The discretion, however broad it is, has its limitations as above pointed out. It must be exercised with great care, within the defined limits,

always for the purpose of doing justice, never of doing or sustaining injustice. It must be exercised upon an anxious and careful consideration of all the circumstances surrounding the transaction or res gestae under consideration. Judicial responsibility is never more oppressive than when a matter of right is submitted to the discretion of a court. Therefore, it should be always careful to observe the limits which define it, heedful of the maxim, "misera est servitus, ubi jus est vagum aut incertum."

There are the strongest reasons in this case to induce this court to exercise its discretion in granting the prayer of the petitioner. In the first place, we have seen that the bonds of petitioner are not barred by any act of limitation, and it should not be so held. The case above cited from 17 Cal. is correctly decided, and solves this; nor are the coupons on such bonds barred—especially so held in Meyer v. Porter, 65 Cal. 67, 2 Pac. 884. See, also, Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646. Provision is made by the acts of the legislature above alluded to for funding the bonds issued before the enactment by the city of Sacramento. The city was unable to meet its obligations, and time was granted to it by the operation of these acts. The creditors accepted the proposition to extend the time of payment of the debt before contracted, and received new bonds in exchange for old indebtedness. If there was any delay to present bonds issued in 1858 to be exchanged under the act for new bonds, certainly the city was not hurt by it, and the creditor did not lose his right to payment, or to receive new bonds, because he was indulgent and forbearing to the embarrassed debtor. As was said by Baldwin, J., in Underhill v. Trustees, supra: "We cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute merely because the creditor waited after this [that is, after the passage of the act of the legislature] for his money." The bona fides of the bonds presented by petitioner is not impeached or assailed in any way. No fraud is hinted at in relation to them, nor to the indebtedness for which they were issued. The bonds were properly issued for actual existing indebtedness. They remained unpaid.

Further, such has been the conduct of the authorities of the city that it does not lie in their mouth to appeal to this

court so to exercise its discretion as to refuse the writ asked for. They continued for years after the passage of the acts to issue new bonds in exchange for the old ones without raising this question. It is so found by the court below. These exchanges of bonds amounted to the sum of $90,630. According to the finding (3), at the time of the passage of the act of March 22, 1864, there were outstanding unpaid claims against the city of Sacramento amounting to about $100,000, including the three bonds involved herein. After the passage of said act, up to and including the year 1880, the board of trustees of the city of Sacramento issued under the act of March 22, 1864, new certificates in exchange for old bonds of the city, and other demands accruing prior to the first day of January, 1859. The following new bonds are found to have been issued, under the act of 1864, in the year mentioned, and for the amounts named below, viz.:

In 1864	$21,642
In 1865	11,499
In 1866	5,754
In 1867	580
In 1867	216
In 1870	3,113
In 1872	39,611
In 1873	1,311
In 1875	1,100
In 1876	1,100
In 1878	2,404
In 1879	100
In 1880	2,200
The whole amounting to	$90,630

Why, then, should the defendants here be allowed to invoke the exercise of discretion by courts, when year after year, up to 1880, they were funding the old bonds by issuing new ones in their stead? There is nothing in the act of 1864 to inhibit their being funded. No day is named in the act of 1864, as in the former acts, after which the old bonds then outstanding should not be funded, and the new bonds issued in their stead. The act of 1864 provided that bonds should be issued for all claims which accrued prior to the 1st of January, 1859, that the board of trustees should, on examina-

tion, consider legal or just. It is nowhere alleged or claimed or contended by defendants that the bonds of petitioner are not legal or just. The findings (1, 2, 3) of the court distinctly negative any such pretense or contention. Nor is it claimed or contended that the board of trustees refused to fund them because they were not legal or just. The failure to present them, under these circumstances, should not be allowed to operate against the holder. The trust was a continuing one, and the holder of the old bonds had a right to present them, and get new bonds in exchange, at any time during the continuance of the trust. The language is strong enough to amount to a mandate. It is to fund bonds found to be legal and just. We do not say that the conduct of the board constituted a technical estoppel on them, but it furnishes the strongest reason why its refusal to fund should not be regarded. It is said that, inasmuch as the act of 1864 did not prescribe a time within which the old indebtedness should be presented, it should be presented within a reasonable time after the passage of the act. This may be conceded. The bonds involved in this case were not presented in a reasonable time. Why were they not? It was during a continuance of a trust to last at least till 1903. It may be conceded that they could not be presented after 1903, though some of the bonds for the payment of which the debt was created might then have remained unpaid; but why could they not be presented before that time? The creditor here has certainly been conspicuously indulgent to an embarrassed debtor. Should he be punished for his kindness by losing his debt, honestly contracted, and honestly owing? This would be a strange position to assume in a court of justice. As the statute of limitations, under the act, could not run, it would be strange to hold, as was held in the court below, that the creditor was barred by laches. It is not a case where there was never a statute of limitations which could bar the debt. But for the legislation on the subject, the statute would run against bonds and coupons. But the legislature speaks with direct and undisguised tone, and in effect says, "We have provided a mode by which you can have time to pay this debt, but you must not, and shall not, plead such statute." There was nothing unfair or unjust in this; on the contrary, it was just all around, when the

creditor consented, and was evidently helpful and beneficial to the embarrassed municipality.

Further, as the operation of the statute or of lapse of time were in effect and in reality suspended by the legislation regarding this indebtedness, we cannot perceive how laches could be predicated of the creditor under the facts of this case. It is held to be settled law in New York, under a statute of limitations substantially identical with the statute of this state, that laches cannot be held to take place when there is an existing statute of limitations applicable to the matter litigated; and properly so, for the reason that the doctrine of laches grew up in courts of equity in regard to matters in litigation because there was no statute of limitation applicable, and hence they proceeded on the ground of unexplained delay as evidence, and, by analogy to the statute, refused to enforce the claim because of laches or staleness of the demand sought to be enforced: See Derby v. Yale, 13 Hun (N. Y.), 277; Wood, Lim., sec. 62; and Morse v. Royal, 12 Ves. 373. And certainly no such reason as staleness of demand or laches can be held or assumed to exist, during the running of a continuous trust, years before its expiry, when, by the very meaning and intent of the settlement prescribed by the legislature, the operation of the statute of limitations is suspended, and is to cease running. The board of trustees are the trustees of the creditors for the payment of the indebtedness above referred to, with ample means of payment placed in their hands by the legislature. They can, under powers vested in them by the legislature, levy taxes on the property of the city to raise funds for such payments. They can do this every recurring year; and they have abundant property within the city, subject to their power to levy and collect taxes, to raise these funds during each recurring year. There is no excuse of inability to provide for the means of payment. The means to raise the funds necessary are amply sufficient, and at hand, right before their eyes; and accordingly the idea cannot be entertained for a moment that the taxpayers of Sacramento, owning ample taxables, are unwilling to pay the debts of their city government, honestly contracted for their benefit, or that they desire the stain of repudiation to rest upon their growing and lovely city, to mar its fair fame and its conspicuous beauty.

Further, as to the defense of limitation. The act of limitation is founded on the ground that the proofs of a defense to a claim may cease to exist or be destroyed by lapse or operation of time. This cannot be so in this case. The claim here asserted is bonds signed, sealed, and delivered, having the attestation of such indicia of genuineness and bona fides. They were issued after the original indebtedness was examined into, and found to be justly and honestly due. It would be strange if a register or record was not kept of them by the city authorities. No doubt there was, for their genuineness and honesty are not impugned in this case by any one. These evidences constitute a permanent record, and they may be fairly inferred to exist, and to be in the hand of the city government. No testimony as to the bonds of the petitioning creditor has been lost. They remain in the form of a permanent record, as a check on anyone who may dare to present spurious bonds for funding, and to expose such an attempt. The bonds of the petitioner are presented to the trustees for their inspection, and it is not pretended in any way that they were or could be at all deceived or entrapped. Why, under these circumstances, any delay or laches or staleness should be held to operate against the petitioner here, I cannot see. The whole matter is well attested, and the circumstances existing explained. The city was much embarrassed, and was slow in making payments, even of the interest on the bonds. The creditor indulgently waited, and now it is urged he should be mulcted for it by losing his debt. Can this be just or equitable, under any view that can be taken of the case? I can see no particle—no scintilla—of equity in any such contention.

Another matter may be adverted to in this connection. It is clear that the legislation in relation to the funding of these bonds was accepted by the authorities of the city of Sacramento, if these acts were not passed by their procurement. It is found in Freehill v. Chamberlain, reported in 65 Cal. 603, 4 Pac. 646 (see eleventh finding in this case), that these acts were procured to be passed by them. Can we not look to the record in the case cited, under section 1875, Code of Civil Procedure, subdivision 8? These facts are of general interest, as a part of the history of the city of Sacramento. Courts should be able to look to them. It is said

by Heydenfeldt, J., speaking for a concurring court in Irwin v. Phillips, 5 Cal. 146, that "courts are bound to take notice of the political and social condition of the country which they judicially rule." In Conger v. Weaver, 6 Cal. 556, 65 Am. Dec. 528, the same learned judge, speaking for the court, said: "Every judge is bound to know the history and leading traits which enter into the history of the country where he presides." Should not these facts be noted as a part of the history of the country? Certain it is, the acts were accepted by the government of Sacramento after they were enacted, and they have reaped the benefit from them that they were designed to secure. After carrying out these acts, and acting under them, they should not now be permitted to turn round, and urge lapse of time as a reason why they should not acknowledge and fund the bonds of an indulgent creditor.

For the foregoing reasons I am of opinion that the lapse of time in asking for the funding of the bonds herein involved furnishes no reason or excuse why the prayer of the petitioner herein should not be granted; that to refuse such a prayer would be highly unjust, and sanctioning repudiation of an honest debt; and that the judgment should be reversed, and the cause remanded, with directions to the court below to enter a judgment for petitioner as asked for by him.

LEHMANN v. SCHMIDT.*

No. 12,547; December 5, 1889.

22 Pac. 973.

Factors—Lien—Conversion.—Defendant Agreed to Sell plaintiff's wine at a certain net price, the excess to be divided equally between them. After receiving a part thereof, and making advances to plaintiff thereon, and paying freight, in accordance with the agreement between them, defendant refused to receive any more; and, before any of the wine had been sold, plaintiff demanded a return of that which defendant had received, without offering to pay back the money which defendant had advanced and expended for freight.

*For subsequent opinion in bank, see 87 Cal. 15, 25 Pac. 61.

Held, that under Civil Code, sections 2026, 3051, 3053, defining a factor, and giving him a lien on the property placed in his hands for money advanced and expended, defendant was a factor, and had a lien on the wine, and a right to retain it, so that his refusal to comply with the demand did not constitute a conversion.

APPEAL from Superior Court, City and County of San Francisco; James G. McGuire, Judge.

Action by Ernst Lehmann against R. Schmidt for goods sold and delivered. Judgment for plaintiff, and defendant appeals.

Chapman & Slack for appellant; A. Heyneman for respondent.

BELCHER, C. C.—The case presented for consideration is this: One E. B. Smith was the owner of about one hundred thousand gallons of wine, which he desired to sell. The wine was stored in a cellar at Cordelia, and was in an unsalable condition. Smith met the defendant, Schmidt, and, as he testifies, Schmidt said "he thought he could make a proposition to me, and that, if I would name the standard price that I would be willing to receive for the wine, that he thought he could bring it to the city and treat it, and whatever could be got more than the amount that I would be willing to sell it for after treating it would be divided between us." The parties then entered into a written agreement, as follows:

"San Francisco, March 3, 1886.

"Agreement made between E. B. Smith, of Martinez, and R. Schmidt, of San Francisco, as following: (1) The said E. B. Smith, having at his cellars at Cordelia about 50,000 gallons Malvasia and Mission, 30,000 gallons Zinfandel, and 22,000 Malvasia, agrees to sell his wines through the agency of the said R. Schmidt at the standard price of 20 cents (twenty cents) per gallon, net. (2) The said R. Schmidt agrees to prepare these wines into a marketable condition at the rate of 1 cent (one cent) per gallon, and to outlay freight on these wines to this city, amounting about to 1 cent (one cent) per gallon. It is further agreed between the parties hereto that all the profits arising out of the sale of these wines over and above the standard price of 20 cents per gallon, and the additional expenses, about 2 cents per gallon,

shall be divided in equal shares between the parties hereto; and the said R. Schmidt agrees to furnish the necessary advances of money, in case E. B. Smith is in want of any, the latter giving the proper time of notification to procure the money. No commissions to be deducted, as the one-half of the profit is considered equivalent for all charges and commissions."

Under and in pursuance of this agreement, Smith sent to defendant, on the twentieth day of March, 1886, five thousand eight hundred and two gallons of the wine, and, on the eighth day of May following, two thousand one hundred and seventy-nine gallons more; and defendant received the wine, and paid the freight thereon. On account of the wines so delivered, and under the agreement, defendant advanced and paid to Smith several sums of money, aggregating $678.50. Defendant also delivered to Smith some casks, which Smith says he ordered, and defendant says "were sold to Smith at his request, and the charges made against him as advances under said contract." For some reason not clearly stated, defendant became dissatisfied, and refused to receive the balance of the wine under the contract; and thereupon, on the thirtieth day of May, 1886, Smith sold all the wine remaining at Cordelia to other parties for eleven cents per gallon. Subsequently, on the seventeenth day of June, 1886, Smith demanded from defendant a return of the wines delivered to him under the contract, but defendant refused to give them up, or make any accounting. No offer was made at the time of this demand, or subsequently, so far as appears, to pay defendant the money he had advanced on the wines and expended for their freight and improvement, or any part thereof, nor to return to him the casks which he had furnished. In this condition of things, Smith, on the seventeenth day of July, 1886, sold and assigned to the plaintiff all his "interest and claim, of whatever kind and nature, in and to those ten thousand gallons of wine, more or less, now held by R. Schmidt, or sold by him for my account"; and thereafter, on the twenty-third day of the same month, the plaintiff commenced this action, alleging in his complaint "that on or about the eighteenth day of June, A. D. 1886, in the city and county of San Francisco, state of California, E. D. Smith sold and delivered to the defendant, and at his

instance and request, those certain goods, wares, and merchandise, to wit, nine thousand gallons wine, at twenty cents a gallon, amounting in the aggregate to the sum of eighteen hundred (1,800) dollars"; that defendant agreed to pay for the same, but had not paid the said sum, or any part thereof, though often requested so to do; and that Smith on the seventeenth day of July, assigned, set over, and transferred to plaintiff "the aforesaid indebtedness and claim against said defendant."

The court below found, among other things, that Smith delivered to defendant, under the agreement, and at the times above stated, seven thousand nine hundred and eighty-one gallons of wine, and that this wine was, at all the times mentioned, worth the sum of twenty cents per gallon, amounting to $1,596.20; that defendant advanced for and on account of the wines, under the agreement, the sum of $678.50 in money, and that he "made no further advances of any kind, or incurred liabilities of any kind, chargeable to said E. B. Smith under said agreement"; that defendant refused to proceed further under the agreement, and on the seventeenth day of June, 1886, Smith made a demand upon him for the return of said wines, and for an accounting of any wine sold by him under the contract, but that he refused to return the said wines, or to give any account of the same, or any part thereof; "that no part of said seven thousand nine hundred and eighty-one gallons of wine had been sold by said defendant prior to said seventeenth day of June, A. D. 1886, and that the whole of said seven thousand nine hundred and eighty-one gallons of wine was then and thereafter converted to the use and benefit of said defendant"; that on the seventeenth day of July, 1886, Smith, "by an instrument in writing, assigned, set over, and transferred to the plaintiff the indebtedness and claim against the defendant sued on in this action"; and, as a conclusion of law, that plaintiff was entitled to judgment against the defendant for the sum of $917.70, and legal interest thereon from the seventeenth day of June, 1886. Judgment was accordingly so entered, and from that judgment the defendant has appealed.

It is contended for the appellant that the judgment was erroneous, and that there are several sufficient reasons for its

reversal. We think it necessary to consider only one of the objections urged. It is unquestionably settled law, as claimed by respondent, that, when one person takes and converts to his own use the personal property of another, the owner may waive the tort, and sue in assumpsit for the value of the property converted: Fratt v. Clark, 12 Cal. 89; Roberts v. Evans, 43 Cal. 380; Berly v. Taylor, 5 Hill (N. Y.), 577; 2 Greenl. Ev., sec. 108. But this rule does not apply to the case in hand. Here the defendant was employed by Smith as his factor to sell wine: Civ. Code, sec. 2026. Some of the wine was shipped to him, and he paid the freight, and expended other money upon it. He also advanced to Smith a considerable sum of money. For the money so paid, expended, and advanced he had a valid lien on the wine placed in his possession: Civ. Code, secs. 3051, 3053. And, when demand was made that he return or account for the wine, it was all still in his possession unsold, and there was no offer to pay back to him any of this money. Under these circumstances, he had a right to retain the wine, and his refusal to comply with the demand did not constitute a conversion. From this it necessarily follows that the plaintiff had no cause of action in assumpsit for goods sold and delivered. His remedy, if he had any, was by some other action or proceeding. We therefore advise that the judgment be reversed.

We concur: Vanclief, C.; Hayne, C.

PER CURIAM.—For reasons given in the foregoing opinion the judgment is reversed.

MOONEY v. DETRICK.*

No. 12,551; December 12, 1889.

22 Pac. 1111.

Insolvency.—A Discharge in Insolvency is not a Bar to an Action on a contract for hiring for a certain length of time, for money which became due thereon after defendants were declared insolvent, as under Insolvency Act of 1880, chapter 87, section 42, only such sums as were due at the time they were declared insolvent could be proved, and would be affected by the discharge.

*For subsequent opinion in bank, see 85 Cal. 549, 26 Pac. 280.

APPEAL from Superior Court, City and County of San Francisco.

Action by John H. Mooney against E. Detrick and J. H. Nicholson. Judgment for plaintiff, and defendant Detrick appeals.

Kellogg & King for appellant; Dorn & Dorn for respondent.

SHARPSTEIN, J.—This action is for the recovery of money alleged to be due plaintiff from defendants under a contract between them, to the following effect: Plaintiff having sold and assigned a patent right to defendants, in consideration thereof promised to serve said defendants in and about their business for the term of five years from the first day of January, 1881; and the defendants agreed to employ the plaintiff during said entire period of five years, and to pay him for every day of his employment, during said entire period (Sundays and holidays excepted), the sum of $4.50. Pursuant to the terms of said agreement, defendants employed plaintiff in and about their business constantly, and paid him in full therefor, until the first day of March, 1884. Since March 1, 1884, defendants have failed and refused to give plaintiff employment, except for the space of one hundred and sixty-six days, and refused to pay plaintiff anything more than $664 under said contract. Judgment was entered in favor of plaintiff, and against the defendants, for the sum of $1,333.40, interest and costs. Defendant's motion for a new trial was overruled, and from that order and the judgment this appeal is taken by defendant, Detrick. The defendants in their answer allege that as a firm and individually they and each of them were on the 14th of July, 1884, discharged of and from all debts, liabilities and claims whatever, except such as were by the insolvent laws excepted from its operation, and that the claim sued on in this action is not one of the claims so excepted. The petition of the defendants as a firm and as individuals was filed on the twenty-eighth day of February, 1884, and the plaintiff's cause of action, if any, has accrued since that date. The discharge and proceedings leading up to it are well pleaded, and the allegations of the defendants in relation thereto are admitted by the plain-

tiff to be true. The plaintiff presented his claim against the defendants to the assignee in insolvency, and he refused to allow it; whereupon plaintiff applied to the court in which the insolvency proceedings were pending for leave to sue the assignee, but such application was denied. The demand sued on in this action was not set forth in the schedule of claims, debts, liabilities and demands filed by the defendants or either of them in the insolvency proceedings, and was not, and, we think, could not have been, proved therein. When the defendants were adjudged to be insolvent there was nothing due from them, or either of them, to the plaintiff under their contract with him. Had anything then been due from defendants to plaintiff, he might have proved his claim for the amount, and no more: Insolvent Act 1880, c. 87, sec. 42. The certificate of discharge is only a bar to debts and demands which were or might have been proved, but not as against personal covenants which were not provable. If a demand is not provable, it is not barred by the certificate. This is the just and settled rule: Murray v. De Rottenham, 6 John. Ch. (N. Y.) 52. Judgment and order affirmed.

We concur: McFarland, J.; Thornton, J.

BUNTING v. SALZ et al.*

December 16, 1889.

22 Pac. 1132.

Wrongful Attachment.—In an Action for the Alleged Wrongful Attachment and sale of plaintiff's wagon to satisfy another's debt, evidence of its cost price is admissible to aid in determining its value at the time of the alleged conversion.[1]

*For subsequent opinion in bank, see 84 Cal. 168, 24 Pac. 167.

[1] Cited and approved in Bacigalupi v. Phoenix Building & Constr. Co., 14 Cal. App. 637, 112 Pac. 894, an action on a building contract, as supporting the theory that, in the absence of evidence to the contrary, proof of the actual cost of completing the structure may be given as tending to show the reasonable cost.

Sale.—A Memorandum Given as a Bill of Sale of a "4-horse Concord" wagon, executed by the debtor to plaintiff, is competent evidence on the question of the sale, by the debtor to plaintiff, of the Concord wagon in dispute.

Sale—Change of Possession.—Where There is Evidence That the Wagon was sold to plaintiff through her agents, it is competent to show that delivery to and possession by one agent, for plaintiff, immediately followed the sale.

Wrongful Attachment.—A Question as to Whether the Debtor, Subsequent to the sale and up to the time of the levy of the attachment, exercised any acts of ownership or control over the property, is not objectionable, as calling for opinion evidence.[1]

Sale.—The Plaintiff's Theory was That No Change of Possession was necessary if the property, at the time it was sold, was in the possession of a third party, who held it as plaintiff's agent by agreement of both parties. Defendant contended that the debtor, who was the agent's husband, had never transferred his possession as required by Civil Code, section 3440. Held, that instructions on the law applicable, if the jury should find the evidence to sustain the theory of either party, were not contradictory.

An Appeal from a Judgment Which is not Taken Within a Year after the entry of the final judgment, as required by Code of Civil Procedure, section 939, will be dismissed.

APPEAL from Superior Court, Alameda County.

Thomas C. Huxley for appellants; Moore & Reed and F. B. Ogden for respondent.

FOOTE, C.—This appeal is taken from the judgment and an order denying a new trial. The appeal from the judgment

[1] **Cited** in Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 718, 103 Pac. 193, as authority for the general rule that ownership of property is a fact to which a witness may testify.

Cited with approval in Nolan v. Nolan, 155 Cal. 481, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, 101 Pac. 522, where the court says that, although there is no general rule permitting a witness to substitute opinion for fact, each case depends upon its own circumstances and the trial court must be allowed discretion in ruling in that connection; also that there is small likelihood of prejudice being worked, since on cross-examination facts can be drawn out as against the opinion.

Cited and followed in Majors v. Connor, 162 Cal. 135, 121 Pac. 374, as being an instance of "questions calling for answers much nearer the border line of conclusions" than that in the latter case, to wit: "When you produced the labor, the men, and put them on the job, under whose control and management were they?"

must be dismissed, as it was taken more than one year after the entry of the judgment: Code Civ. Proc., sec. 939; Coon v. Grand Lodge, 76 Cal. 354, 18 Pac. 384. The action was to recover $750 damages for the conversion of a wagon by the defendants, which the plaintiff claimed to be her property, and taken without her consent. The defendants Salz and Niehaus, and Trefry, a constable, in their answer denied the allegations of the plaintiff's complaint, and justified the alleged conversion on the ground that the property was that of John A. Bunting, and had been seized by Trefry under an attachment, judgment and execution, in an action brought against Bunting by defendants Salz and Niehaus. The facts disclosed by the record are: That John A. Bunting was the child of Mrs. E. M. Bunting, who appears to have resided in New York. He owned a ranch in Alameda county, California, in the year 1883, and with his wife, Fleda O. Bunting, lived there from about the year 1877 until about December, 1883, when, being heavily in debt and apparently unable to extricate himself, he deeded the ranch to his mother, who, as before stated, was living in New York. He received from her at the time of the transfer $2,000 in cash, as part of the purchase price, and she assumed a mortgage for $4,000 already encumbering the land, and, as it appears, before that time, advanced to or paid for him about $3,000. Mr. Overacker, the father of John A. Bunting's wife, seems to have had chief charge of these negotiations for the absent plaintiff, and to have had the deed recorded as soon as executed, at her request; all the parties to the matter appearing at that time to suppose that the wagon and all other farming utensils were sold to the plaintiff by her son. The money received at that time, in cash, was paid out pro rata by John A. Bunting to his various creditors, among whom were Salz & Co., who appear to have been cognizant of the fact of the transfer of the ranch to Mrs. M. E. Bunting. After the transfer, the wife of John A. Bunting, as the agent for the plaintiff, assisted by Mr. Overacker, managed and carried on the farm. John A. Bunting does not seem, after that time, to have had any control or management of the farm or its concerns, or any personal property remaining thereon. He was employed as a railroad man, and was absent most of his time, and certainly after March, 1884, did not reside on the place, and claims that he voted in Los Angeles. From

his evidence it appears that when he transferred the land to his mother he sold and delivered to her agent the wagon in dispute; but the bill of sale he made to the personal property on the land did not include it. The wagon remained on the place in the apparent and open possession of the wife, as agent of the mother, in pursuance of the sale, until April, 1885, when it was attached to the property of John A. Bunting, at the suit of one Dyer, Trefry, the defendant here, being then, as now, the officer levying the attachment. On this occasion the plaintiff was proceeding through Mr. Overacker and Mrs. Fleda O. Bunting, her agents, to recover the wagon as her property, but came to the conclusion that perhaps she could not establish satisfactorily her title to it, and apparently with a view to avoid litigation over the matter and effectually to secure her title to and possession of the property, paid off the debt, for the recovery of which the attachment was issued, and obtained from her son a memorandum in writing, signed by him, as follows:

"San Francisco, 4 | 3, 1885.

"Mrs. E. M. Bunting,

"To John A. Bunting, Dr.

"(1) 4-horse Concord (built).....$260 00

"Rec'd payment,

"JOHN A. BUNTING."

It was given as and for a bill of sale. The wagon, during the time it rested under the levy made upon it, remained on the ranch in charge of a keeper. When the levy was released, it was left, as before, in the possession of John A. Bunting's wife, who claimed it then, as she had always since the transfer of the land to the mother of her husband, as plaintiff's property. Mr. Overacker and his daughter, Mrs. F. O. Bunting, declared that the wagon was considered by them (and so, also, says John A. Bunting), from the time of the transfer of the ranch, as his mother's, and they all treated the conveyance of the land as good and valid in law, and the wife held actual possession of the land and the wagon, openly, as the property of the plaintiff; and after the transfer, having dealings with Salz, one of the defendants, in selling the products of the farm, he never claimed any right to offset any debt he owed for such produce with the indebtedness of John A. Bunting to Salz and Niehaus. But it appears that the wife had, in the year

1883, filed a declaration of homestead on the land, and this had never been abandoned, and she had not joined in the deed from her husband to his mother, but she never asserted any homestead right, and claimed to hold actual possession of the farm as the plaintiff's property. There were some circumstances developed on the trial which strongly induce the belief that the defendants knew this wagon was intended to be sold to the plaintiff when the transfer of the land was made, but there was no positive proof to that effect. The wagon was sold under execution sale at the suit of Salz and Niehaus, and bought by Salz for $160. No question was raised on the trial but what the plaintiff paid full value for the property she purchased, both real and personal. Nor was any claim made that the sale was fraudulent in fact. The main proposition contended for was that there was no such immediate delivery accompanying the sale and followed by an actual and continued change of possession of the property as is contemplated by section 3440 of the Civil Code.

The jury who tried the case found a verdict for the plaintiff in the sum of $525. The defendants contend that the evidence was insufficient to justify the jury in their action. An examination of the record satisfies us to the contrary.

Again, it is said that the court erred in allowing evidence to be introduced as to the cost price of the wagon. The cost price of the property, while not conclusive as to its value at the time of its conversion, is nevertheless a circumstance which is admissible to aid in arriving at the value at the time in question: Angell v. Hopkins, 79 Cal. 181, 21 Pac. 729. It is further objected that the alleged bill of sale, heretofore set out, was inadmissible in evidence, it being claimed in this connection that it did not purport to be a bill of sale of the wagon in dispute. The objection was not well taken. The memorandum in writing, signed by the party who is alleged to have made the sale of the Concord wagon in dispute, tended to throw light upon the matter of the sale of the wagon, and in that view, if no other, it was proper to go to the jury.

The appellant complains, also, that the trial court committed error in not striking out, upon his motion, the evidence of Mrs. F. O. Bunting, the wife of John A. Bunting, showing that in 1883, just after the transfer of the ranch, she, as the agent of the plaintiff, took possession of the wagon. There

was evidence to the effect that the wagon was, at the time of the sale of the ranch, negotiated for and sold to the plaintiff through her agents, Overacker and Mrs. F. O. Bunting, and that it was bought by them for the plaintiff from John A. Bunting. This being so, it was proper to show that the possession and delivery immediately followed to the agent for the principal. It is also assigned for error that the court allowed, over the defendant's objection, this question to be put to and answered by the witness Mrs. F. O. Bunting: "Did Mr. Bunting, subsequent to the sale in 1883, and up to the time of the levy of the attachment by the defendants here, exercise any acts of ownership or control over that property?" The objection to the question was that it called for an opinion of the witness. As it seems to us, the question, fairly considered, called upon the witness to state facts, and was proper.

Further, the appellants claim that certain instructions given for them, and another by the court of its own motion, being correct expositions of the law applicable to the facts of the case, are contradictory to instructions asked by the plaintiff and granted by the court, by which the jury were misled. The plaintiff's theory of the case seems to be, that no change of possession was necessary, if the property at the time it was sold was in the possession of a third party, which party, at the request of the vendor and vendee, agreed to retain its possession for the vendee, while the defendant's contention was that the vendor always had possession, and had not transferred it, as the law requires, to the vendee, under section 3440 of the Civil Code. The view of the law taken by the plaintiff is correct, according to the opinion of the appellate court in Williams v. Lerch, 56 Cal. 330. The instructions are not contradictory; they simply tell the jury what the law is, if they should believe the evidence to sustain either the plaintiff's or defendant's theory of the case. While it may be said that some of the instructions given did not lay down the law as broadly as might have been done, yet, when we come to construe them as a whole, we do not find that the court committed any error likely to mislead the jury.

The defendants further complain that certain instructions asked for by them and refused should have been given. Time and space do not permit of the discussion of them in detail, but from a careful inspection it appears to us that such of the

principles of law embodied in them as were applicable to the case had already been given in other instructions; the others were not applicable to the case, and were properly refused.

We think the facts of this case are such that a jury may well have found as they did. Perceiving no prejudicial error, we advise that the appeal from the judgment be dismissed and the order affirmed.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal from the judgment is dismissed and the order affirmed.

JUDSON v. LYFORD et al.*

No. 12,032; December 20, 1889.

23 Pac. 581.

Judicial Sale—Rights of Purchaser.—D., Against Whom Plaintiff held a judgment, succeeded, on his wife's death, to one-third of her lands, and conveyed his interest to defendant in trust to be leased, and one-half of the profits applied to his support during his life, and at his death the whole to go to his children. After the execution of the trust deed, plaintiff levied an execution on D.'s interest in the land, and at the sale bid it in, taking a sheriff's deed. Afterward, plaintiff received the balance due on the judgment, and entered a satisfaction in full. Held, that at the time of the sale under execution the legal title was in defendant, and plaintiff, under the sheriff's deed, took nothing but D.'s equitable interest therein, which ceased on D.'s death.

Judicial Sale—Rights of Purchaser.—Whatever may have Been Plaintiff's right, as a creditor, to set aside the deed of trust because given to hinder and defraud creditors, it was lost by his purchasing the "right, title, and interest of D." in the property, and accepting the balance due on the judgment, and acknowledging satisfaction thereof, and he thereafter had no other standing than that of a purchaser at an execution sale, subject to the rule of caveat emptor.

APPEAL from Superior Court, Marin County.

*For subsequent opinion in bank, see 84 Cal. 505, 24 Pac. 286.

E. F. Swortfiguer (Walter Van Dyke of counsel) for appellant; Sawyer & Burnett for respondents.

PATERSON, J.—On the seventh day of November, 1881, a judgment was entered in the superior court in favor of Michael Lynch, and against T. B. Deffebach, for the sum of $9,446.74, and on the day following it was assigned by Lynch to the plaintiff herein. On September 15, 1883, Mrs. Deffebach died, and T. B. succeeded to an undivided one-third of her estate, the same being the lands described in the complaint. On October 10th following, Deffebach conveyed the property to defendant Lyford, as trustee, in trust for him (said D.) and his four minor children. By the terms of the trust Lyford, as trustee, was to sell sufficient of the interest of D. to pay off all debts of the estate of Mrs. D., deceased; lease the remainder of his (said D.'s) interest upon such terms as said trustee should think proper; and out of the rentals pay taxes, and expenses of caring for the property, render one-half of the surplus profits to said D. for his support during his natural life, and upon his death to apply the whole of the surplus to the support and education of the children; further, to convey, upon T. B. Deffenbach, Jr's., becoming of age, or, in the event he should not live so long, then when the youngest child living should become of age, to the said children or the survivors of them, said property, share and share alike. An execution on the judgment was issued out of the superior court on the thirteenth day of November, 1883, and levied on all the right, title and interest which Thomas B. Deffebach had in said property on said thirteenth day of November, and on December 15th, following, was executed by a sale of the property to this plaintiff for the sum of $9,500. At the time of this levy the lien of the judgment upon this land, if any there had ever been, had ceased. No redemption having been made, a certificate and sheriff's deed were issued to plaintiff in due time and in due form. Deffebach died on June 24, 1884. The defendant Lyford is the administrator of the estate of T. B. D., deceased, and is also guardian of the minor children. After the answers of the defendants were filed herein, to wit, on November 13, 1884, the plaintiff having received from the defendant the balance due upon the judgment in the case of Lynch v. Deffebach, entered a satisfaction in full of the judg-

ment therein. This action was commenced on August 21, 1884, to set aside the deed of trust from Deffebach to Lyford as fraudulent and void, and to quiet the title of plaintiff to the premises. The court found that D. was not insolvent at the time of the death of his wife; that the deed to Lyford was without any moneyed consideration; that Lyford knew nothing of the indebtedness of D. at the time he accepted the trust; that the trust deed was not made in fraud of plaintiff, or of his rights, or with the intent to hinder, delay or defraud creditors; that the equity held by D., and purchased by plaintiff, ceased upon the death of D., and that plaintiff is not the owner of the property described in the complaint, or any part of it, or interest therein. Judgment followed for defendant, and plaintiff appealed. Upon the facts admitted, proved and found, the judgment is right and should be affirmed. The equitable interest retained by D. was subject to execution: Code Civ. Proc., sec. 688. Lyford, the trustee, was to receive the rents, and apply them to the maintenance of the cestui que trust, and after the death of D. was to convey to the children; he therefore held the legal title: Robinson v. Grey, 9 East, 1; Silvester v. Wilson, 2 Term Rep. 444. Plaintiff purchased, and the sheriff's deed conveyed to him, only the right, title and interest of D. For this interest he paid $9,500, leaving a balance of about $1,600 due on the judgment. As an execution purchaser he can claim no more than the equitable interest left by D. on November 13, 1883. Caveat emptor is the rule: Plant v. Smythe, 45 Cal. 162; Freeman on Executions, secs. 301, 309; Boggs v. Fowler, 16 Cal. 564, 76 Am. Dec. 561; Abadie v. Lobero, 36 Cal. 398. The plaintiff cannot now be heard to say that the interest he purchased was not worth what he paid for it. He must stand by his bargain. The court will not consider the fact that the interest he purchased was terminated by the death of D., soon after the sale, and that by reason thereof plaintiff has not been able to realize the actual amount due on his judgment.

But it is claimed by appellant that the purchaser here was, at the time the trust deed was executed, a creditor of the grantor, and therefore the general rule that the purchaser takes upon himself all risks as to title does not apply. A complete answer to this is found, we think, in the facts that there was no actual fraud, that the deed was not void per se, and

that the relation of creditor and debtor no longer exists. When the plaintiff accepted the balance due on the judgment and entered a satisfaction in full, the relation of debtor and creditor ceased, and he has no other standing in court than that of a purchaser at execution sale. Whatever may have been his right as a creditor to set aside the deed because given to hinder, delay or defraud creditors, it was lost by reason of his own acts in purchasing, in terms, "the right, title and interest of T. B. Deffebach," accepting the balance due on the judgment, and acknowledging that he had received satisfaction in full. The court found that, in consideration of the payment by Lyford, as administrator of the deficiency—$1,598.60—plaintiff executed and acknowledged full satisfaction of the judgment. This finding is not assailed. D. did not convey all of his property to Lyford. He retained an equitable interest. The sheriff did not sell the land. He sold and conveyed simply the right, title and interest of D. Plaintiff paid $9,500 for that interest, as his deed shows, and the judgment became satisfied to that extent. When the administrator paid the balance, and satisfaction was entered, D. was no longer a creditor, and the rule of caveat emptor became no less applicable to his case than to that of every other purchaser under execution sale: Freeman on Executions, sec. 340; Abadie v. Lobero, supra.

Judgment and order affirmed.

We concur: Works, J.; Fox, J.

LABISH v. HARDY.

No. 12,479; December 27, 1889.

23 Pac. 123.

Community Property.—A Husband and Wife Occupied a Tract of land belonging to the United States from 1847 until 1856, when the wife died. The husband continued to occupy the land until 1871, when he received a deed to it from the town of Santa Cruz under act of Congress of July 23, 1866. Held, that the occupation by the husband and wife during her life did not operate to render the land community property, or vest the wife with any ownership whatever. Following Labish v. Hardy, 77 Cal. 327, 19 Pac. 531.

Community Property.—In an Action by a Daughter of the First marriage against a second wife, to whom the land had been

deeded, to recover the interest claimed by plaintiff as heir of her deceased mother, the deed will not be vacated on the ground that it was a gift, and the husband was indebted to plaintiff, and did not leave sufficient property to pay her.

APPEAL from Superior Court, Santa Cruz County; F. J. McCann, Judge.

Action by Isabella Labish against Jane Hardy to set aside a deed to quiet title to certain premises in the city of Santa Cruz. In 1847, plaintiff's parents went into possession of the land in dispute, which was then public land of the United States, and continued to occupy it, together with their children, as their home, until the death of plaintiff's mother, which occurred in June, 1856, at which time plaintiff was seven years old. After the death of plaintiff's mother, the father of plaintiff continued to occupy said premises as his home until his death, in 1883. In June, 1860, plaintiff's father married the defendant. In May, 1871, plaintiff's father took a deed for the premises from the corporate authorities of the town of Santa Cruz, under the act of Congress approved July 23, 1866, entitled "An act to quiet title to certain lands within the corporate limits of the city of Benicia and the town of Santa Cruz"; said premises then being within the corporate limits of the town of Santa Cruz and public lands of the United States. On August 8, 1881, plaintiff's father made a deed of gift of the premises to the defendant. This deed was recorded, but is alleged not to have been properly acknowledged when this action was commenced. At the time this deed was made, the premises constituted all the property of plaintiff's father, and he never afterward acquired any property. The defendant claims the premises under this deed. This action was commenced August 7, 1885. Plaintiff alleged that before that time she acquired and then owned any interest in said premises that might have descended from her mother; that after his first marriage W. H. Hardy received property and money in trust for the plaintiff upon the understanding and express promise on his part to invest and pay over the proceeds thereof to the children of his first wife, plaintiff being one of those children; that this trust was never repudiated by him, but was never carried out, and that at the time of his death he owed several hundred dollars to plaintiff on account of said

trust property; that plaintiff did not know of the deed of gift to defendant until after her father's death, and did not know until then that her father had not left sufficient property to pay her demand, exclusive of said real property. These and other pertinent facts were set up in the complaint and amended complaint. The defendant demurred and the demurrer was sustained. The plaintiff declining to further amend, judgment of dismissal was entered; and plaintiff appeals from such judgment.

W. D. Storey for appellant; Henry P. Bowie for respondent.

PER CURIAM.—We have examined the record in this case and find no error in it. The case is determined by Labish v. Hardy, 77 Cal. 327, 19 Pac. 531. Judgment affirmed.

HEILBRON et al. v. CAMPBELL, Judge.

No. 13,478; December 28, 1889.

23 Pac. 122.

Judge—Disqualification.—Under Code of Civil Procedure, section 170, disqualifying judges to act who are interested in the controversy, where three parties are adversely claiming to be the owners of a certain tract of land, one of whom is the judge, and the other two adverse litigants before him, asking him to determine which of them is the owner of the land which he claims to own, and to appoint a receiver for said land, a writ of prohibition will issue to prevent him from acting further in said cause.[1]

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[1] **Cited** and followed in Adams v. Minor, 121 Cal. 374, 53 Pac. 816, where a bank of which the judge was a stockholder intervened, and the issues involved the validity of bonds owned by it.

Cited and followed in Meyer v. City of San Diego, 121 Cal. 110, 66 Am. St. Rep. 29, 41 L. R. A. 765, 53 Pac. 437, where the rule of disqualification was held inexorable in cases where the judge's interest is such that his rulings must affect himself. In that case the judge was a tax-payer, and the proceeding before him one to set aside a contract for waterworks, payment for which called for the issue of forty year bonds and a special tax in that connection.

Cited with approval in Meyer v. City of San Diego, 121 Cal. 106, 66 Am. St. Rep. 26, 41 L. R. A. 764, 53 Pac. 435, where it is intimated that the disqualification does not assume necessarily that a judge will have an eye to self-interest in his rulings, but rests on public policy, which is intolerant of a mere appearance of bias.

S. C. Denson, George R. B. Hayes and A. L. Hart for petitioners; Garber, Boalt & Bishop (Craig & Meredith of counsel) for respondent.

WORKS, J.—This is an application by the petitioners against the respondent, as judge of the superior court of the county of Fresno, to prevent him from proceeding further in an action pending in said court, in which Charlotte F. Clarke et al. are plaintiffs and the petitioners are defendants. The petition shows, in substance, that in 1880 an agreement was entered into by and between the petitioners and one Jeremiah Clarke by which the petitioners leased from said Clarke, for a term of years, a certain tract of land in said county of Fresno, being a part of what is known as the "Laguna de Tache Rancho," and in which agreement it was provided that the petitioners should have the option, during said lease, to purchase said property at the price and on the terms therein named; that the petitioners took possession of said property under said lease and contract, and complied with all its terms and conditions; that the said Charlotte F. Clarke, who was the wife of Jeremiah Clarke, made application for and procured letters of guardianship over the property of her said husband on the ground of his unsoundness of mind, and before the expiration of said lease, and before the time given the petitioners by said lease and contract to exercise their option to purchase said property, she, as such guardian, brought an action in said court to set aside said contract on the ground that said Clarke was at the time he executed the same of unsound mind; that said cause was tried before the respondent as judge of said court, and findings and judgment rendered in favor of the plaintiff, and a motion for a new trial has been made, and is pending before the respondent; that a motion has also been made by said plaintiff for the appointment of a receiver to take charge of said property, which is also pending. As a reason why the respondent should be prohibited from acting further in said cause, it is alleged that during the pendency thereof before him he purchased a certificate of purchase for a certain tract of land, consisting of two hundred and fifty-seven acres, which is a part of the land included in said lease and contract, and of which the petitioners took and held possession thereunder, and a part of the land claimed by each of

the parties in said action and in controversy between them, and that the respondent still holds and owns said certificate, and claims to own said property. There are also other allegations, not necessary for us to notice particularly. The respondent demurs to the petition, and also answers the same. In his answer he denies that the land purchased and claimed by him is a part of said ranch, but he does not deny that the parties to said action are claiming it to be a part thereof, or that the petitioners are in possession of it, claiming it to be within their contract, or that it is in controversy between the parties in said action.

So, putting the matter in the most favorable light for the respondent, we have a case in which three parties are adversely claiming to be the owners of a certain tract of land, one of whom is a judge of the court, and the other two adverse litigants before him, asking him, by his judgment, to determine which of them is the owner of the land which he claims to own. Not only so, but he is asked to appoint a receiver to take possession of land which he claims to own, and account to him for its management. He is called upon by the application for a receiver, or may be, to determine what lands shall go into the hands of such receiver. As he claims a part of the land, and asserts that it is not within the larger tract in dispute, the temptation to exclude it in making his order will at once arise; and, if his land is to go into the hands of a receiver, it must be of some interest to him who shall become such receiver, and take charge of and manage the land. It seems to us that neither argument nor authority is necessary to show that a judge should be prohibited from sitting in a cause under such circumstances; but we cite Code of Civil Procedure, section 170; North Bloomfield etc. Min. Co. v. Keyser, 58 Cal. 315; Stockwell v. Board, 22 Mich. 341; Hall v. Thayer, 105 Mass. 219, 7 Am. Rep. 513; Cottle's Appeal, 5 Pick. (Mass.) 483; Sigourney v. Sibley, 21 Pick. 101, 32 Am. Dec. 248; Coffin v. Cottle, 9 Pick. 287; Gay v. Minot, 3 Cush. (Mass.) 352; Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 114; Oakley v. Aspinwall, 3 N. Y. 547.

It is contended that our statute only disqualifies a judge where he has a direct interest in the result of the suit, and that as in this case a judgment for or against either of the parties, determining the controversy between them, could

not bind the judge, or affect his title to the land claimed by him, he was not disqualified. But we cannot give the statute this narrow construction. It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality; and to this end he should decline to sit, or, if he does not, should be prohibited from sitting, in any case in which his interest in the subject matter of the action is such as would naturally influence him either one way or the other. We have shown how a judge might, and probably would, be influenced to act in the appointment of a receiver. In the decision of the action on its merits, the temptation to decide in favor of one party or the other might be equally strong. It might become very important to him to have the land go to one of the claimants rather than the other. One might be friendly to him and his claim, and the other not. With one a compromise might be easy, and with the other difficult. One might be much more inclined, and more able, pecuniarily or otherwise, then the other, to litigate his claim against him. And, aside from what might influence the judge under such circumstances, it appears to us to be unseemly for a judge to sit in an action involving the title, as between the litigants, to a subject matter of which he claims to be the sole owner, and must in the end litigate as between himself and the litigant who succeeds to the property by his judgment.

The question whether the taking of testimony was necessary was discussed at the argument. The view we have taken of the issues renders this unnecessary. Let the writ issue prohibiting the respondent, Campbell, from acting further in said cause.

We concur: McFarland, J.; Sharpstein, J.; Fox, J.; Paterson, J.

GREGORY v. KEATING et al.

No. 12,472; December 31, 1889.

22 Pac. 1084.

Mortgages—Foreclosure—Modification of Judgment.—Where a defendant in a mortgage foreclosure claims an interest in the property adverse and superior to that of the mortgagee, and the findings by the trial court do not determine such claim, the judgment, which bars only the right, title, and equity of redemption of such defendant, will be modified so as to preserve, unaffected and unprejudiced, the adverse right so claimed.

APPEAL from Superior Court, City and County of San Francisco; E. B. Mahon, Judge.

Action by James B. Gregory against Denis Keating and Mary Jane Keating to foreclose three mortgages executed by said Denis Keating to plaintiff. Defendant Mary Jane Keating claimed an adverse and paramount title to the buildings on the mortgaged premises. Plaintiff obtained a judgment, and defendants appealed.

Mich. Mullany for appellants; A. H. Laughborough (Carter P. Pomeroy of counsel) for respondent.

THORNTON, J.—In this case the judgment forecloses the mortgages executed to plaintiff, and subjects to sale the right, title, and interest of the mortgagor, Denis Keating, in the mortgaged premises. It forecloses and bars only the right, title, and equity of redemption of defendant Mary Keating as to such possession. It does not purport to affect in any way her prior adverse right to the buildings on the premises, if she has any. Nor do we see in the findings of facts anything determinative of the claimed adverse right of Mary Keating. The facts found as to her only bear on her right to remove the buildings from the land involved in the suit under the terms of the lease. On the return to the court below, that court is directed to modify the judgment so as to preserve the adverse right to the buildings set up by her, unaffected and unprejudiced by the judgment. On the

making of such modification of the judgment, the judgment and order will stand affirmed.

We concur: McFarland, J.; Sharpstein, J.

HUTCHINSON v. McNALLY et al.*

No. 12,579; January 1, 1890.

23 Pac. 132.

Ejectment—Pleading.—Where the Complaint in Ejectment simply sets forth a deraignment of title, and then alleges that "while plaintiff was the owner, and entitled to the possession, as hereinbefore mentioned and set forth, the defendant entered," the allegation as to ownership will be disregarded, as stating a mere conclusion.

Ejectment—Homestead.—Where the Complaint Alleges That the Land in controversy was set off as a homestead to the widow of a deceased owner, it must state whether the land was set off in fee or for life, since an assignment of a homestead to a widow in fee out of her deceased husband's estate, though erroneous, is conclusive unless appealed from.

APPEAL from Superior Court, Alameda County.

T. M. Osment for appellant; Charles F. Hanlon for respondents.

HAYNE, C.—Ejectment. Judgment for defendants upon demurrer to the complaint. Plaintiff appeals. The complaint sets forth a deraignment of title, and then alleges that "while the plaintiff was the owner, and entitled to the possession, as hereinbefore mentioned and set forth," the defendant entered, etc. From the manner in which this statement as to ownership is put, it is evidently a mere conclusion, referring to, and limited by, the deraignment, and is therefore to be disregarded: Turner v. White, 73 Cal. 300, 14 Pac. 794; People v. Reed, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 475.

*For subsequent opinion in bank, see 85 Cal. 619, 24 Pac. 1071.

Then, does the deraignment show a right of recovery in the plaintiff? The facts alleged are in substance as follows: In May, 1878, one Esther C. C. Hutchinson, who was the wife of Charles C. Hutchinson, declared a homestead upon the property in controversy, which was the separate property of the husband. In the following June the husband died, leaving a will, which was admitted to probate, and by which the property was devised to the plaintiff. In April, 1880, the proper court made an order "setting off said homestead to Esther C. C. Hutchinson, surviving widow of the decedent." In 1881 the widow died. The case is very like Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938 (No. 12,072, filed December 9, 1889). There it was held that while it was erroneous to set off a homestead selected out of the separate property of the decedent to the widow "absolutely, as her sole and separate property," yet that the error was to be corrected by appeals, and that if the order was not appealed from it was conclusive. Under this decision it is very material to know what was the purport of the order setting off the homestead. Did it purport to set it off to the widow in fee, or only for life, or for a less period? The complaint is silent in this respect. It simply says that the homestead was set off to the widow. This ambiguity was pointed out by special demurrer. The specification of the demurrer was that "it does not appear therefrom whether or not the order setting aside the property to E. C. C. Hutchinson set apart the property to her in fee or for life." This demurrer was sustained, and we think properly so; and, the plaintiff having elected to stand upon his complaint, we advise that the judgment be sustained.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

UNITED LAND ASSOCIATION et al. v. KNIGHT.*

No. 12,748; January 2, 1890.

23 Pac. 267.

Public Lands—Patents—Authority of Land Office.—Act of Congress of 1864, section 7 (13 U. S. Stats. at Large, 334), provides that "it shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location shall be made as near as practicable in one tract, and in a compact form, ... and it shall be the duty of the commissioner of the general land office to require a substantial compliance with the directions of this section before approving any plat and survey forwarded to him." Act of Congress of 1851, section 13 (9 U. S. Stats. at Large, 631), provides that "the patent shall issue to the claimant on his presenting to the general land office an authentic certificate of confirmation, and a plat or survey of said land duly certified and approved by the surveyor general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed and furnish plats of the same." The decree confirming defendant's land claim described the land as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, ... on which the city of San Francisco is situated, as will contain an area of four square leagues. Said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." The survey made under this decree included by metes and bounds land below the line of ordinary high tide. The patent following the survey described the lands by metes and bounds, but recited the decree of confirmation. Held, in ejectment for the lands below high tide, that the north, east, and west boundary lines given in the decree and recited in the patent would prevail over those given in the survey and the granting clause of the patent, as there was no power by which land could be included in the survey and patent, the claim to which had not been confirmed by the decree.

Ejectment—Attack upon Patent.—In an Action of Ejectment, plaintiff can attack the patent from the United States, under which defendant claims, on the ground that the land office had no power to issue a patent for the lands embraced therein.

*For subsequent opinion in bank, see 85 Cal. 448.

APPEAL from Superior Court, City and County of San Francisco. J. V. Coffey, Judge.

Ejectment by the United Land Association and others against Knight. Judgment for plaintiffs, and defendant appeals.

E. F. Preston and James A. Waymire for appellant; Doyle, Golpin & Scripture for respondents.

PATERSON, J.—This is an action of ejectment to recover a block of land lying below ordinary high tide in the city and county of San Francisco, and being a portion of that part of San Francisco known as "Mission creek lands." The defendant claims under a patent of the United States to the city, issued June 20, 1884, in satisfaction of a pueblo grant of four square leagues, which was confirmed by the decree of the United States circuit court, May 18, 1865. The tract confirmed by this decree is described as "a tract situated within the county of San Francisco and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid"—subject, however, to certain deductions for lands previously reserved or dedicated to public use by the United States. Under the decree referred to, a survey was made, and on August 13, 1868, was approved by the United States surveyor general for the state of California, which fixed the southern boundary of the land by following the high-water mark; thus excluding the lands of Mission creek, of which the land in suit is a part. Subsequently, in 1884, the Secretary of the Interior caused another survey to be made, one line of which ran directly across the mouth of Mission creek; thus including the lands of Mission creek as a part of the grant to the city. The patent to the city recites the decree confirming the grant. Plaintiffs' claim of title is based upon a deed from the tide land commissioner

to Ellis, dated November 24, 1875, and subsequent conveyances to them. They contend that the state, upon its admission into the Union, by virtue of its sovereignty, became seised of the land, it being tide land. This right of the state, they claim, is recognized by the decree confirming the grant to the city. It is claimed that the patent is bound to follow the decree in fixing the boundary at high-water mark, and that so much of the patent as attempts to convey lands below high-water mark is void because in excess of the authority of the officials issuing the patent.

Appellant contends that a party in an ejectment suit cannot question the validity of a United States patent for land upon the ground that it does not follow the decree confirming the grant; that the patent from the United States government to the city and county of San Francisco for the pueblo lands confirmed to it under the acts of Congress of March 3, 1851, and of July 1, 1864, by the decree of the United States circuit court, which patent conforms in its description of the lands granted to the final survey, made, as provided in the latter act, in accordance with the instructions of the commissioner of the general land office, is conclusive evidence, as against the state of California and its grantees, of the right of the city and county to all the lands embraced within the exterior limits of the survey, including tide lands lying below the line of ordinary high tide. It is said that the question is no longer an open one in this state. The case of People v. City and County of San Francisco, 75 Cal. 388, 17 Pac. 522, is cited and relied on in support of this contention. It did not appear in People v. City, etc., whether the decree of confirmation was made a part of the patent. In this case it is shown that the patent contains full recitals of the decree, and shows upon its face that the tract confirmed embraced "so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues," etc. It shows that three sides of the tract are bounded by natural monuments, namely, "on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." If it be con-

ceded, however, that the decision referred to covers the questions involved as fully as is claimed by the appellant, we feel satisfied that the supreme court of the United States would not follow it in this case or any other, involving the same questions, which might go to that court on a writ of error. "It has always been the practice here to adopt that view of a legal question which has been taken by the supreme court of the United States, when the question is within the branch of the jurisdiction of that court which may be exercised by writ of error to this court." As the question is a federal question, it is one which will be decided ultimately by the supreme court of the United States: Belcher v. Chambers, 53 Cal. 635.

The question involved in this case is whether the officers of the land department had power to patent land outside of the natural boundaries given in the decree of confirmation. If the land department had no jurisdiction to act, if any portion of the land described in the patent was not a part of the public domain, or if there was no legislation authorizing its conveyance by the land department, then, under the decisions of the United States supreme court in Doolan v. Carr, 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228, and other cases therein cited, the patent is inoperative to pass the title; and objection can be taken to it on these grounds at any time, and in any form of action.

Upon her admission into the Union, the state of California became the owner, by virtue of her sovereignty, of all tide-water lands within her borders lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state, of course, could not take more than the United States received; and the claim of the state, by virtue of her admission and her sovereignty, was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the exterior boundaries of larger tracts: Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674. The United States government has

exercised the power vested in it, and has, through its courts and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving, as the boundaries thereof on the west, the north, and the east, the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include, between it and the high-water lines north of it, said four square leagues of land. This, it seems, the surveyor did not do; but, ignoring the natural boundaries fixed by the court in its decree for the west, north and east, ran his line below the line of high tide, and across the mouth of Mission creek, and included within his description the lands described in the complaint—lands of the state not included within the decree of confirmation. Following the survey, the patent describes the land by metes and bounds.

The government of the United States is in duty bound to carry into effect the stipulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by Congress; and it would seem that when Congress vested in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land office to require a substantial compliance with the directions of the section before approving any survey and plat forwarded to him," that the officers of the land department are, as to such lands, merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Section 13 of the act of 1851 (9 U. S. Stats. 631) provides that "the patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of confirmation, and a plat or survey of said land, duly certified and approved by the surveyor general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be ac-

curately surveyed, and to furnish plats of the same; and in the location of said claims the said surveyor general shall have the same power and authority as are conferred on the register of the land office by section 6 of the act to create the office of surveyor of the public lands of the state of Louisiana, approved March 3, 1831." Under this provision, we think it clear that the power of the surveyor general is restricted to the claim as finally confirmed. It has been decided in several cases, on appeal from decrees of confirmation, that the description must be followed; that "the decree is a finality, not only on the question of title, but as to the boundaries which it specifies": United States v. Halleck, 1 Wall. 455, 17 L. Ed. 668; the Fossat Case, 2 Wall. 649, 17 L. Ed. 739; Higueras v. United States, 5 Wall. 829; Van Reynegan v. Bolton, 95 U. S. 35, 24 L. Ed. 352. In Higueras v. United States the court declared that "confirmation must precede the survey which is made subject to such an order; and, if the decree of confirmation is so indefinite and incongruous that it cannot be executed, then it is void, and of no effect, and the claim to the land stands upon the same footing, in legal contemplation as a claim which was never presented to the commissioners for adjudication." In the Fossat case the court held that it was not competent for the district court to depart from its own decree in the exercise of the power conferred by the act of June 14, 1860; that the court was bound to execute the decree by fixing the lines on the grant in conformity with the provisions of the decree, the decree being not only the foundation of the validity of the grant, but of the proceedings in the survey and location of the land confirmed. In that case, as in this, the decree provided for specific boundaries on three sides of the tract, and left one side to be surveyed. If the court, which then had the power to supervise and confirm or reject the survey as the land department now does, could not alter or depart from the specific boundaries given in its own decree, how can the officers of the land department?

These cases, to be sure, were direct appeals to the supreme court of the United States; but they bear directly upon the question of the authority of the officers of the land department to patent lands outside of the boundaries of the decree of confirmation, and that is the question here. If the land

granted is not within the power of the officer, the grant or patent is invalid. In Polk v. Wendal, 9 Cranch, 87, 3 L. Ed. 665, Chief Justice Marshall said: "There are cases in which a grant is absolutely void, as where the state had no title to the thing granted, or where the officer had no authority to issue the grant." In New Orleans v. United States, 10 Pet. 662, 731, 9 L. Ed. 573, the court said: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face, it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor no right passes to the grantee." So in this case, unless Congress has given the land department power to dispose of land belonging to the state of California—lands lying outside of the boundaries of the decree—a patent to land shown to be outside of such decree is invalid. In Wright v. Roseberry, 121 U. S. 488, 30 L. Ed. 1039, 7 Sup. Ct. Rep. 985, it appeared that land which had been previously granted to the state by the swamp land act was held by the defendant under a patent from the United States issued on a pre-emption claim. The court held the patent to be invalid as a conveyance, because the land was not, at the time it was patented to the defendant, within the granting power of the land office. The state of California took the lands in controversy, in 1850, as effectually as if she had received them by grant from Congress. If the land department had the power to determine that land outside of the decree of confirmation should be conveyed, it would necessarily have the power to pass on its own right to convey the land, but the decree of confirmation was the foundation of the power to make the patent. It precedes and limits the power of the officers of the land department. If the latter are not limited by the decree, then the court may confirm a tract in one place, and the officers locate it in another, and the patent which attempts to convey the latter tract controls the former. This cannot be, for the whole power of deciding what shall be granted in pursuance of the treaty is intrusted to the judicial department. Section 7 of the act of 1864 (13 U. S. Stats., p. 334) shows that the power of the land department is limited by the provisions of the decree: "It shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of con-

firmation as closely as practicable whenever such decree designates the specific boundaries of the claim; but, when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location shall be made, as near as practicable, in one tract, and in a compact form, ... and it shall be the duty of the commissioner of the general land office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him." Here is an emphatic declaration by Congress that the decree is the limit of the power of the land department, and shows very clearly, we think, that Congress has not given to the officers of the land department the exclusive and final power of determining whether any land is within or without the location of the decree, or of locating grants in places where the courts have not located them. If such power is not conferred upon the land department, any attempt to convey land outside of the permanent boundaries named in the decree is not an error of judgment simply, but is an act void for want of jurisdiction.

Under the laws of Mexico existing at the time of the treaty, lands below and within one hundred and ninety varas of the seashore could not be held in private ownership (Wheeler, Land Titles, 13); and the land officers of the United States could not, in the absence of a judicial adjudication that such land belonged to a Mexican claimant, convey to him. "All that place is called 'sea beach' which is covered by the waters of the sea when at its highest point during all the year": Hall Mex. Law, 448. The king could not alienate such lands: New Orleans v. United States, 10 Pet. 726, 9 L. Ed. 598; Milne v. Girodeau, 12 La. 324. The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads and gulfs, and the rivers, although they may not be navigable (Mission creek is navigable), their beds, mouths, and the salt marshes: Hall, Mex. Law, 448–503; Civ. Code Mex., art. 802.

A patent cannot be issued by the land department to a person not named in the decree, because the courts, and not the department, are given the power to determine the person to whom the lands were granted by Mexico. If the judgment of the court should decree that the grant is a forgery, and therefore void, and the land department should patent the land

claimed, the action of the department would be shown to be void upon the production of the decree, because Congress has given to the courts jurisdiction to determine the validity or invalidity of the claim. Of course, in cases where the court, by its decree, has established the validity of the grant, and a tract of a certain number of acres has been confirmed to be located within the exterior limits of a larger tract, it is left to the officers of the land department, in their discretion, to locate and survey the requisite number of acres within the larger tract; and their action in execution of the decree is not subject to attack in any collateral proceedings, because it is within their jurisdiction, and in pursuance of the decree. In such cases there cannot possibly be any conflict between their action and the directions of the decree. It is auxiliary to the decree, and as conclusive as the decree itself. Unless we bear in mind the distinction between cases of this kind—the confirmation of a certain number of acres to be located within the exterior boundaries of a larger tract, and designated by the supreme court of the United States as "floats"—and cases in which the boundaries or some of them are definitely fixed by the decree, the decisions upon the subject will appear to be very conflicting. An examination of the authorities cited at the argument of this case and the argument of People v. City and County of San Francisco, with this distinction in view, will illustrate the principle stated and explain what would otherwise seem to be a conflict of decisions on the subject. In Moore v. Wilkinson, 13 Cal. 478, relied on by parties claiming under the patent from the United States, the court regarded the grant "as conveying an interest to four leagues lying within a larger tract": Page 486.

It is true the patents, in some cases, seem to have gone beyond the boundaries of the diseno, and yet they were held not to be void; but it was so held in each case because the parties attacking the patent had no title to land lying outside of the exterior boundaries, and were not, therefore, in a position to attack the validity of the patent. In Doolan v. Carr, the court held (only Waite, C. J., dissenting) that one who had not even connected himself with the paramount source of title might question the validity of the patent: 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228. In Ward v. Mulford, 32 Cal. 369, the district court, as it had the right to do

... to its decrees, had reviewed ... Even if its action were irregu- ... But at the time the grant before us in ... the surveyor was not required to re- ... art for confirmation, and no report

... 45 Cal. 339, the patent covered only ... described in the decree, but not the ... had no legal title, because no ... under the decree. The ques- ... department to patent lands ... the decree was not involved. ... it may act. Without the ... n. Furthermore, in that case ... metes and bounds, and it is ... in that case, in his written ... the tract in controversy were ... apply. In Teschemacher ... 21 Am. Dec. 151, the court assumed ... a specific quantity lying in an area ... 24. In Cassily v. Carr, 48 Cal. 339, ... between the decree and the patent. The ... court said, simply carried out the ... conclusive between the parties. Of course, ... patent but carry out the decree," the ... between the parties. In none of the cases ... the power of the officer to issue a ... braced in the decree considered. It ... that because the patent is conclusive ... land department had jurisdiction, it is ... lands lying without the boundaries of the ... as within them. The surveyor cannot incor- ... lands not confirmed, nor can he shift ... with the natural boundaries—mountains. ... The presumption always is, doubtless, that ... bounds follow the decree; but to hold that the ... monuments are indisputably fixed by ... and distances of the surveyor, and approval of ... would be placing a construction upon the ... intended by that body, and not war- ... decisions of the national courts. The land de-

partment has power to do what the court cannot do, viz., locate, survey, and patent tracts of land designated by the court within larger areas; and when a rancho is confirmed by name to fix its boundaries, but when the court itself, in its decree, fixes one or more of the boundary lines, the department has no jurisdiction to go beyond it. The distinction between the different kinds of grants is clearly and fully stated in United States v. McLaughlin, 127 U. S. 428, 32 L. Ed. 213, 8 Sup. Ct. Rep. 1177, and in United States v. Curtner, 38 Fed. 1. In Doolan v. Carr, supra, the court said: "There is no question as to the principle that, where the officers of the government have issued a patent, in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times, to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority—then their act was void —void for want of power in them to act on the subject matter of the patent, not merely voidable. In which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue." Under this and other decisions, including many decisions of this court (McLaughlin v. Powell, 50 Cal. 64; McLaughlin v. Heid, 63 Cal. 208; Southern Pac. R. R. Co. v. McCusker, 67 Cal. 67, 7 Pac. 122; Chicago etc. Mining Co. v. Oliver, 75 Cal. 194, 7 Am. St. Rep. 143, 16 Pac. 780, quoted approvingly in Wright v. Roseberry, supra), the evidence offered and admitted was competent, relevant and material, and fully established the findings of the court. The

deeds to Ellis, and evidence of the location on the earth's surface of the line of high tide, were properly admitted.

Now, if it be true, as a matter of law, that the surveyor general had no power to include in a survey any land, the claim to which was not confirmed by the decree of the circuit court, and that neither the commissioner of the land office nor the Secretary of the Interior had any power to direct or approve such a survey, the only question is, Which of the west, north, and east boundary lines, respectively shall prevail—those given in the decree, and recited in the patent, or those given in the survey, and employed in the granting clause of the patent? In determining this question, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. It becomes simply a question of construction. Both descriptions are upon the face of the patent, and the case is one in which the plaintiffs claim that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes land not included within the natural boundaries, and which defendant claims to own, but which is in fact owned by plaintiffs; that their title should be quieted because the natural and permanent boundary lines should prevail over the description by metes and bounds. A determination of this question will in no way affect the location of the south line. By the decree, the surveyor was to fix that line; but, if the surveyor had run his line through the bay of San Francisco, and taken in lands of the state lying below the high-water mark on the eastern shore of the bay, or lands lying in the foothills of the county of Contra Costa, would it be contended that the patent, although reciting the decree confirming four leagues on the peninsula of San Francisco, with the bay of San Francisco as the eastern line thereof, is conclusive evidence, as against the state or its grantees, of the right of the city and county of San Francisco "to all the lands embraced within the exterior limits of the survey, including tide land lying below the line of ordinary high tide," and in fact conclusive against everybody as to all lands included in the survey, wherever located? If the plaintiff, in the case supposed, would not be prevented from showing that the metes and bounds included land belonging to him, not confirmed by

the decree, and which the land officers could not convey, why may he not show the same thing in this or any other kindred case? In More v. Massini, 37 Cal. 432, the court said: "The call for the seashore as to the southern boundary must be regarded as the more definite and certain, and will prevail over a call for a mere station and over the courses and distances."

But, whether we consider it as a collateral attack, or a mere matter of construction, it is clear, we think, that, under the decisions of the supreme court of the United States in Doolan v. Carr, supra, and other cases there cited, "want of power in an officer of the land office to issue a land patent may be shown in an action at law by extrinsic evidence, although the patent has been issued with all the forms of law required for a patent of public land." There were no errors in the rulings of the court. The evidence shows beyond doubt that the land in controversy is outside of the natural boundaries of the decree. The judgment is therefore affirmed.

We concur: Works, J.; Fox, J.; Sharpstein, J.

THORNTON, J.—I concur in the judgment, and will file an opinion hereafter.

I dissent: McFarland, J.

SMITH et al. v. OLMSTEAD et al.*

No. 13,125; January 25, 1890.

22 Pac. 1143.

Wills—Omitted Children—Power of Sale.—Under Code of Civil Procedure, section 1561, providing that "when property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court," and section 1307, providing that children of a testator omitted from a will must inherit from the testator "as if he had died intestate," a power of sale in a will does not authorize the sale of the interests of children not mentioned in the will, without the previous sanction of the probate court required in ordinary cases, and a subsequent confirmation of the sale by the court does not validate it.

*For subsequent opinion in bank, see 88 Cal. 582, 22 Am. St. Rep. 1143, 26 Pac. 521.

APPEAL from Superior Court, Los Angeles County; A. W. Hutton, Judge.

Chapman & Hendricks for appellants; C. Edgar Galbraith and Anderson, Fitzgerald & Anderson for respondents.

HAYNE, C.—Suit to quiet title. Judgment for plaintiffs. Defendants appeal. In 1880 the owner of the property died leaving a will by which the whole of the property was devised to the widow, who was made sole executrix without bonds, and it was provided that "she have absolute power to sell any or all of said real and personal property at public or private sale, with or without advertisement, and without application to any court, and without approval or authority of any court whatever." The will was admitted to probate and letters testamentary were issued to the widow. Acting under the power contained in the will, she sold the property to the defendant Eliza J. Olmstead without obtaining an order of sale from the probate court. She reported her proceedings to the court, however, and an order confirming the sale was made, and a conveyance executed. The plaintiffs are the four minor children of the testator. They were not mentioned or in any way referred to in the will, and claim as pretermitted heirs. The main question argued is whether the power of sale given by the will authorized a sale of the children's interests without the previous sanction of the probate court required by the Code of Civil Procedure in ordinary cases. This seems to us to be a question of construction. The provision of the Civil Code in relation to a child of whom no mention is made in a will is that he "must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section": Civ. Code, sec. 1307. The "preceding section" is in relation to children born after the making of the will, either during the lifetime of the testator or after his death, and provides that such a child "succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." So far as the question in hand is concerned, these provisions are in substance the same as those of the statute of wills previously in force. The provision of the Code of Civil Procedure in

relation to powers of sale is substantially the same as section 178 of the old probate act, as amended in 1861, and is as follows:

"Sec. 1561. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine, but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale be confirmed by the court."

We do not find that the cases in this state cited by counsel determine the question presented. In Estate of Delaney, 49 Cal. 76, it was held that where the legal title is devised to the executor the provisions requiring order of sale, confirmation, etc., do not apply. In Estate of Durham, 49 Cal. 495, it was held that where the legal title is not devised to the executor, and he has a naked power of sale, the provision requiring a confirmation applies, and that such confirmation must be according to prescribed formalities. The latter decision is not in point, because here there was a confirmation, to which no objection is taken. And the former decision is not in point, because it is settled that the legal title descends to and vests in the pretermitted heir, who becomes a tenant in common with the devisees, if there are any valid devises: Pearson v. Pearson, 46 Cal. 627. This latter case, however, while it shows that the rule laid down in Delaney's Estate has no application, does not determine the question involved here, which is whether the omitted child takes the title subject to the power of sale or not. In Oregon it has been held that a power of sale in a will does not cover the interest of a posthumous child not mentioned in the will: Northrop v. Marquam, 16 Or. 173, 18 Pac. 457. In that state, however, the statute provided that so far as such child was concerned the testator "shall be deemed to die intestate," which is somewhat broader language than that of our statute. In New York the statute is substantially the same as ours. And in that state it is held that the share of a child born between the making of the will and the death of the testator, and not

mentioned in the will is not affected by a power of sale contained in the will: Smith v. Robertson, 89 N. Y. 558. The argument in favor of the omitted child seems to be that if the testator had died intestate the interest of such child could only be sold in certain cases, and after certain formalities, and that the statute provides, in substance, that the omitted child shall inherit from the testator "as if he had died intestate." The argument on the other side is that the statute only provides that the omitted child shall inherit "the same share" as if the testator had died intestate, and that while such share goes to the child it is subject to the other provisions of the will. Each of these arguments seems to us to assume the real question in dispute. And the case is such that no satisfactory conclusion can be reached from a consideration of the mere language of the statute. But we think that a due regard for the interests of pretermitted heirs requires that the safeguards provided by law against improper sales of their property should only be dispensed with in a clear case; that this cannot be said to be a clear case, because the law presumes that the omission of all mention of a child was from accident, misapprehension, or forgetfulness, and it cannot be concluded with any degree of certainty that the testator would have given a power of sale of the child's interest if the fact that it would have an interest had been present to his mind. If, for example, a testator supposes that his child is dead, and under that belief devises his whole property to one not of his blood, it is very natural that he should make such devisee sole executor, and give him unrestricted power of sale. But would he have given such power to the devisee if he had known that his child was alive, and would inherit the whole estate? Upon the whole, though the matter is not free from doubt, we think it better that the rule laid down by the New York case should be followed, viz., that, inasmuch as the devise of the child's interest is inoperative, the power of sale of his interest should be construed not to apply to it. The order of confirmation was not conclusive of the legality of the sale. We therefore advise that the judgment appealed from be affirmed.

We concur: Belcher, C. C.; Gibson, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

PEOPLE v. TOAL.*

No. 20,610; February 1, 1890.

23 Pac. 203.

Inferior Courts—Manner of Establishing.—Constitutional article 6, section 1, provides that "the judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county." Section 13 provides that the legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1, and shall fix by law the powers, duties and responsibilities of the judges thereof. Held, that an inferior court can be established only by the passage of an act of the legislature, and its approval by the governor, or its passage over his veto, in the same manner as any other law is enacted under constitutional article 4, sections 15, 16.[1]

Police Courts—Manner of Establishing.—Laws of 1887, pages 88-90 (Constitutional 16th Amend., amending article 11, section 8), provides that any city of more than ten thousand, and not more than one hundred thousand inhabitants may frame a charter for its own government "consistent with and subject to the constitution and laws of the state," and, if ratified by a majority of the qualified voters of the city, it shall be submitted to the legislature for its approval or rejection as a whole and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, and the organic law thereof, and "shall supersede any existing charter, and any amendment thereof, and all special laws inconsistent with such charter." Held, that this does not dispense with the requirements of constitutional article 6, section 13, and that the provisions of a charter establishing a police or inferior court in such city which depend alone for their validity on a joint resolution of approval of the charter by a majority of the members of the legislature, but in no way submitted to or passed on by the governor, are unconstitutional, and the acts of such court are void.

Fox, J., dissenting.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

*For subsequent opinion in bank, see 85 Cal. 333, 24 Pac. 603.

[1] Cited in Ex parte Reilly, 85 Cal. 632, 24 Pac. 807, in which it is stated that the decision intimated that the "so-called Whitney act .... applied to the city of Los Angeles."

Wm. T. Williams and Horace Bell for appellant; Attorney General Geo. A. Johnson for the people.

FOOTE, C.—The defendant was convicted of an assault with intent to commit murder. From the judgment of conviction, an order overruling his motion in arrest of judgment, and an order denying his motion for a new trial he appeals. The order overruling the motion in arrest of judgment is not itself appealable by the defendant, but may be reviewed on his appeal from the judgment: People v. Majors, 65 Cal. 100, 3 Pac. 401.

The main point relied on by the defendant seems to be that the police court of the city of Los Angeles, before the judge of which his preliminary examination was had, and by whose order he was committed for trial before the superior court of Los Angeles county, was not a legal court; that the judge thereof was not authorized by the constitution of the state to perform any function whatever as a committing or other magistrate. The defendant made a motion in due time that the information be set aside upon the ground that before the filing thereof he had not legally been committed by a magistrate, under section 995 of the Penal Code. If in fact he was not legally committed by a magistrate, the point made is well taken: People v. Shem Ah Fook, 64 Cal. 382, 1 Pac. 347; Kalloch v. Superior Court, 56 Cal. 229.

In support of his contention the defendant declares that the provisions of the charter of the city of Los Angeles, under and by virtue of which L. Stanton, the police judge, who sat as committing magistrate in his case, was elected and claims to exercise the functions of a magistrate, are in violation of article 6, section 1, of the state constitution; that the joint resolution under which that charter was adopted by the legislature as a whole, to be found in acts of 1889, page 512, was without force and effect so far as it concerned the establishment of a police court in said city. That resolution, omitting the preamble and charter which precede it, reads as follows:

"Resolved, by the senate of the state of California, the assembly thereof concurring, (a majority of all the members elected to each house voting for and concurring herein,) that said charter be, and the same is hereby, approved as a whole for and as the charter of said city of Los Angeles."

Was this a proper legislative method of enacting a law which would establish a legal inferior court, such as article 6, section 1, of the state constitution warrants? That section of the above-named article reads thus: "The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in an incorporated city or town, or city and county." It is conceded by the appellant that the supreme court of California, in Brooks v. Fischer, 79 Cal. 173, 5 L. R. A. 429, 21 Pac. 652, has held that the charter above referred to was legally adopted, and valid in most of its provisions, but that as to the particular provisions which bring into existence a police court, and invest it with the functions of a committing magistrate, that there has been no adjudication of their validity. Section 13 of article 6 of the state constitution is: "The legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof." It seems clear from the language used in these constitutional provisions that it was the intention of those who framed that instrument, in establishing inferior courts, such as the one under consideration, to declare that it must be done by the passage of an act of the legislature, and its approval by the governor, or, upon his veto thereof, must be passed again by two-thirds of the members of each house voting therefor, and must become a law in the same manner as any other law is to be enacted under sections 15 and 16, article 4, of the constitution; and this method of procedure must prevail in all cases, unless a different rule is established, pertaining to the bringing into existence of inferior courts, under provisions of charters, such as that of Los Angeles. This difference can only exist, if it be authorized at all, by the sixteenth amendment to the state constitution, amending the eighth section of article 11 of the constitution, to be found in Laws of 1887, pages 88–90. The portion of it applicable here is as follows:

"Any city containing a population of more than ten thousand, and not more than one hundred thousand inhabitants, may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by

causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy thereof to the mayor or other chief executive of said city, and the other to the recorder of the county. Such proposed charter shall then be published in two daily papers of general circulation in such city for at least twenty days; and the first publication shall be made within twenty days after the completion of the charter; and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city, at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment; and if approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendments thereof, and all special laws inconsistent with such charter."

Does this amendment to the constitution of 1879, as to such courts as the one in hand, which the Los Angeles charter seeks to establish, supersede the provisions of the constitution, which were existent at the time of its ratification, and which we have heretofore cited? If not, then the establishment of the police court, the judge of which acted as an examining magistrate in this case, was without due form of law, and the court thus attempted to be established does not exist, its acts are void, and the defendant was not legally committed by a magistrate. We do not think, in so important a matter as this, viz., the changing of the form by which inferior courts shall be established by law in cities of the class to which Los Angeles belongs, that the sixteenth amendment, supra, should be held to have so far-reaching an effect, and that in this way the important provisions of the constitution, which before its passage existed, should be held to be struck dead. Again, the amendment declares that if such a charter is "approved by a majority vote of the members elected to each house it shall

become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendments thereof, and all special laws inconsistent with such charter." Thus the idea kept constantly in view is that the charter must be consistent with and subject to the existing constitution, and all general laws, but that any preceding charter or amendment, or special laws inconsistent with the charter are to be superseded by the approval of the legislature alone. In other words, the force and effect of the sixteenth amendment, supra, as applied to charters of cities containing over ten and under one hundred thousand inhabitants is this: That such charters may be framed in the manner prescribed by the amendment, and, if ratified by the majority of the qualified voters of the city to which it is to apply, shall be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment, and if approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendment thereof, and all special laws inconsistent with such charter, but that such charter must be consistent with and subject to all constitutional provisions then in force, and all general laws. Is it permissible to declare that the provisions of a charter establishing a police or inferior court in a city of over ten and under one hundred thousand inhabitants, which depend alone for their validity upon a joint resolution of approval of the charter by a majority of the members of the legislature, but not in any way approved by, submitted to, or passed on by the governor, are consistent with or subject to the constitutional provisions and general laws in existence at the time of the ratification of the sixteenth amendment, supra, which constitutional provisions prescribe a different method for the establishment of such a court as the charter provisions bring into existence. And can a constitutional amendment which contains such limitations as those existing in the sixteenth amendment, supra, be said to supersede the necessity of establishing an inferior court in the manner which the prior sections of the constitution point out as proper? We do not think that the sixteenth amendment is susceptible of the construction claimed for it; and we are of opinion that it plainly declares to the contrary, viz., that

all existing constitutional provisions, and general laws in force at the time of its adoption are continued in full force and effect, and control any such charter. And this view is strengthened when we come to consider section 6, article 11, in reference to corporations, which concludes in these words: "And all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws." If the whole charter had been duly passed by the legislature, and approved by the governor, or passed over his veto, and in all respects taken the ordinary form of legislative enactment under the constitution (sections 15 and 16, article 4), we are not prepared to say, if no general law upon the same subject had remained in force, but that a police or other inferior court thus established would be within the terms of the constitutional provisions above adverted to.

There is another feature connected with the matter in hand, which, although not urged, is yet, under the circumstances, of such importance as to deserve at least passing mention. It is a well-known fact, as we think, not only, as it appears from the preamble of the resolution adopting the charter of Los Angeles, that it is a city of more than ten and under one hundred thousand inhabitants, but that it is a city of more than thirty and under one hundred thousand inhabitants. If this is so, then the portion of the charter objected to on the ground heretofore stated is also unconstitutional in another point of view, in this, that it is obnoxious to the so-called "Whitney act," which is adverted to by the appellate court in the lately decided bank case, In re Ah You, 82 Cal. 339, 22 Pac. 929 (No. 20,586). It was there decided that the freeholders' charter of the city of Oakland, a city of the same class with Los Angeles, was subject to the provisions of the act above mentioned, the same being held a "general law," and to be found in the Statutes of 1885, page 213, and that the police court established by that charter had no existence, and no jurisdiction to try misdemeanors, or any other offense known to the law. It follows, therefore, as it seems to us, that the police judge of Los Angeles had no jurisdiction or authority as an examining and committing magistrate, and that there was no authority of law for filing the information against the defendant; and therefore his motion to set aside the informa-

tion should have been granted. We therefore advise that the judgment and order be reversed.

I concur: Gibson, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

PATERSON, J., Concurring.—It will be conceded, I presume, that the city of Los Angeles is a municipal corporation, having thirty thousand and under one hundred thousand inhabitants. The judicial power of the city, therefore, is vested in a police court, "to be held therein by the city justices, or one of them, to be designated by the mayor." Whether such power is conferred by the act of March 18, 1885, known as the "Whitney act" (Stats. 1885, p. 213), or by the act in relation to municipal corporations of the second class (Stats. 1883, p. 200), it is unnecessary to inquire, because under both acts it is made the duty of the mayor to designate a justice of the peace to hold said police court. The city is not in consequence of this decision left without a court for the punishment of misdemeanors, and examination into the commission of felonies within the city limits. Being a city having thirty thousand and under one hundred thousand inhabitants, we have to presume, in the absence of anything in the record to the contrary, that the mayor has performed the duty required of him by the act of March 18, 1885, and designated a justice to hold the police court; and we have to presume, further, that such justice is in the actual discharge of his duty as ex officio judge of the police court.

It is said by respondent herein that Stanton's title to his office cannot be tried in this collateral proceeding; that he is at least a de facto officer, performing the duties of his office, and claiming to have been elected thereto in accordance with law. This point raises the most serious question in the case, and, if it were not for the statement in the record, that "the defendant had been examined and held to answer by L. Stanton, Esq., judge of the police court of Los Angeles city, the said police court having been authorized by the legislature of said state, to wit, senate resolution No. 2, approving the charter of the said city of Los Angeles, adopted January 31, 1889, and the said L. Stanton having been elected judge of

said court under and by virtue of said charter, and was so acting by virtue of his said election," I should consider the contention sound. This statement, however, shows that the defendant was held to answer in a judicial tribunal that has no lawful existence, namely, a police court organized under the charter of the city of Los Angeles, sanctioned by the legislature under senate resolution No. 2, and presided over by one who was elected judge of said court under and by virtue of said charter, and was so acting by virtue of his said election. While it is true that the acts of a de facto officer, acting in a de jure tribunal, cannot be questioned, we have here a case in which there is neither a court nor an officer authorized by law; and, as stated before, we must presume that the court authorized by the statute is in existence, and presided over by a justice duly appointed by the mayor. In In re Ah You it was admitted that if the police court established by the freeholders' charter of the city of Oakland had no legal existence its judgment was void, and that the petitioner should be discharged. Perhaps, if such admission had not been made in that case, this court would have been bound to consider Laidlaw a de facto judge, and his acts valid and binding, there being nothing outside of said admission to show that he was acting solely under the authority of the charter and by virtue of his election as a police judge. That case decided that the new charter of Oakland is subject to and controlled by the act of 1885, so far as the police court is concerned, and that decision, under the facts admitted in this case, is conclusive upon the question as to the right of the defendant to his discharge.

FOX, J.—I dissent. Conceding all that is said in the opinion of the commissioners as to the unconstitutionality of that portion of the charter of Los Angeles which provides for the establishment of a police court, and the jurisdiction thereof, I cannot admit that that city is left without a court for the punishment of misdemeanors, and for examination and inquiry into the commission of felonies within its borders. It is conceded in said opinion that the "Whitney act," so called, is a general law applicable to the city of Los Angeles. Even if that be not true, the city is still not left without law and without a police court with jurisdiction ample for in-

quiry into and commitment for offenses such as are charged against this defendant. In the absence of a constitutional provision in the charter, and of the "Whitney act," there is still a general law for the establishment and government of municipal corporations, which establishes a police court in cities of this class, and defines their powers and jurisdiction the same, so far as relates to this case, as the jurisdiction exercised in the examination and commitment of this defendant: See Stats. 1883, p. 200. The magistrate who presided at this examination, and made this commitment, even if not lawfully entitled to hold the place, was presiding in a de jure court of competent jurisdiction, and was himself the de facto judge thereof. His acts and judgments as such are as valid and binding, as to third persons, as though he held the office by strict law: Westbrook v. Rosborough, 14 Cal. 180.

TOGNAZZINI v. MORGANTI et al.

No. 13,362; February 6, 1890.

23 Pac. 138.

Land Patent—Location of Lines—Opinion Evidence.—The lines described in a patent must be located by the court according to the calls of the patent. Witnesses can testify only as to the existence and condition on the ground of what is called for in the writing; and it is error to admit their opinions, speculations, or conjectures as to the location of the lines.

APPEAL from Superior Court, Santa Barbara County; R. M. Dillar, Judge.

W. C. Stratton for appellant; S. E. Crow and John J. Boyce for respondents.

THORNTON, J.—Ejectment for a parcel of land in Santa Barbara county. Judgment for defendants. Plaintiff moved for a new trial, which was denied, and from this order of denial plaintiff appeals. The controversy herein is as to the location of the eastern patented line of the Casmalia rancho. The parcel litigated is triangular in shape. The base of the

triangle is a portion of the southern patented line of the rancho. The plaintiff contends that the eastern line of this triangle is the true patented line. The defendants' contention is that a line farther west is the line as patented. The length of the base line is twenty and twenty-hundredths chains. The other lines start from the ends of the base line, and converge in a northwesterly course until they meet. Of these converging lines, the westerly line is and will be called the "Harris Line," and the eastern is and will be called the "Cooper Line." The plaintiff contends for the Cooper line; the defendants for the Harris line. The court decided in favor of the Harris line, and thus upheld the contention of defendants. This eastern line of the Casmalia is thus described in the patent: It commences at a post which designates a station, and is marked "C No. 2"; "thence descending ridge south, fifty degrees east, eighty-eight chains and fifty links, enter Canada; thence down through some one hundred and fifty-five chains, leaving Canada bearing southeast; thence over low running hills three hundred and ninety-four chains and fifty links; leaves hills, and crosses road, course southwest and northeast, three hundred and ninety-five chains and fifty-five links, to old post in the entrance of the Canada Verde, marked 'T. S. No. 5 and C No. 3.' "

There is one very controlling call in the field-notes of the patent, and that is the road which the eastern line is described as crossing. The testimony shows this road, or the remains of an old road about where it is designated, near the entrance of the Canada Verde. There is testimony that a surveyor's post was erected at this point corresponding with the course and distance of the field-notes. That course is south, 50 east, and the distance 395 chains 55 links from post marked "C No. 2." We are of the opinion that the Cooper line is the true line, or near the true line, of the patent. There is evidence that there was no post found at what plaintiff contends is the true location of post C No. 3. If this post cannot be found, the question would then be very simple. The line must be run according to course and distance, and fixing the corner C No. 3, at the south end of that line, taking care, however, that the line so run shall cross the road called for.

The court, in trying the cause, let in a mass of evidence which had no relevancy to the matter in issue. The witnesses,

most of them surveyors, seem to have been permitted to locate the line according to their opinions. This was not the proper mode of trying the issues or locating the line. In adopting the mode above mentioned, the court abdicates its functions. and turns them over to the witnesses. The witnesses should depose to facts only. The calls of the patent are admitted in evidence, and the line must be located according to these calls. The court must determine what the calls are. The evidence is admissible to identify those calls, to show their location on the ground. To illustrate: A line is called for running from a tree marked "B" to a rock on which is marked in paint the letter "A." The witness can testify only to the existence of the tree and the rock called for. When they are ascertained, the court fixes the line by running a straight line over from B to A. A line is here called for running from a fixed point C No. 2; a course specified, south, 50 degrees east; a specific distance, 395 chains 55 links, to a post, C No. 3, T. No. 5. Before it reaches the post last mentioned, it crosses a road. That line only is correct which crosses the road referred to. A line suggested or testified to which does not cross the road must be rejected at once. If post C No. 3 is found stuck in the ground at the end of the line, that would certainly fix it. A post found 20 chains east of this point, or 20 chains west of it, lying on the ground, should not be considered a moment. If no post is found where the line ends, a line run in accordance with the calls of the patent is the true line. In regard to the road, we wish to be understood as saying, if the road is shown to exist, the line must cross it; if no road is found, the line must end when the distance called for is measured; say, 395 chains 55 links. We repeat, a court fails to discharge its duty when it fixes a line not in accordance with the calls of the written instrument in evidence. The court must make the location. A witness should only be allowed to testify as to the existence and condition on the ground of what is called for in the writing. His opinions or speculations or conjectures are inadmissible, and should have no weight. In this case we are convinced that the testimony shows that the Harris line is not the true line, and therefore the order denying plaintiff's motion for a new trial must be reversed. Cooper's line seems to be nearly correct. His course is a little variant from the course called

for in the patent. It is, however, correct, if at the southern end of the line the post called for, C 3, T. 5, is found. Order reversed and new trial ordered.

I concur: Sharpstein, J.

McFARLAND, J.—I concur on the ground that the court erred in admitting the evidence referred to in Mr. Justice Thornton's opinion.

SUKEFORTH v. LORD.*

No. 13,363; February 22, 1890.

23 Pac. 296.

Fraudulent Conveyance—Pleading and Proof.—In an action for the conversion of merchandise levied on under an execution on a judgment against S., the answer alleged "that the defendant is informed and believes, and, upon such information and belief, so avers the fact to be, that, ... while said S. was so as aforesaid engaged in business, and while he was so as aforesaid indebted, he, said S. and the plaintiff, who is his brother, conspired together for the purpose, and with the intent, to hinder, delay, and defraud the creditors of said S. out of their just debts and demands against him, said S.; and with such purpose and intent said S. made a pretended false and fraudulent sale of the property mentioned in plaintiff's complaint . . . . to the plaintiff; and with such purpose and intent the said plaintiff received said pretended false and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise." Held, that defendant could not prove fraud, under the answer, as it merely alleged a conclusion.

Appeal—Exceptions.—After the Case was Given to the Jury, counsel for defendant said that he desired certain exceptions entered, to which the judge replied, "Have any exceptions entered that you desire," and in answer to counsel's question, "Shall I have the clerk enter them?" the judge replied, "If you choose, do so." Counsel, however, never had any exception entered, either by the court or clerk, and never prepared or had settled any bill of exceptions. Held, that this did not entitle defendant to a review of the rulings.

Works, J., dissenting.

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*For subsequent opinion in bank, see 87 Cal. 399, 25 Pac. 487.

APPEAL from Superior Court, Nevada County.

Geo. A. Rankin for appellant; Cross & Denson and P. F. Simonds for respondent.

FOX, J.—This is an action against the sheriff of Nevada county for the recovery of the sum of $4,000 damages, for the unlawful conversion of a stock of merchandise. The sheriff justifies under an attachment, and subsequent judgment, in the superior court of the city and county of San Francisco, in a suit wherein George D. Cooper was plaintiff and L. M. Sukeforth was defendant. No exception is taken to the regularity or legality of the proceedings or writ in that case. The goods were levied upon as the property of L. M. Sukeforth, the judgment debtor, but found in and taken from the possession of E. G. Sukeforth, the plaintiff in this action. The action was tried before a jury, verdict and judgment in favor of plaintiff in the sum of $3,000, motion for new trial made and denied, and defendant appeals. The value of the property alleged to have been unlawfully converted is admitted by the pleadings to have been $4,000, and the verdict and judgment was for $3,000. This disposes of one point made on the motion for new trial, and insisted upon on the appeal—that the verdict was excessive.

Another point made on the motion, and insisted upon here, is that the evidence was insufficient to justify the verdict. It is not disputed that L. M. Sukeforth and E. G. Sukeforth, the plaintiff in this case, are brothers; that for nine years prior to August 15, 1888, L. M. Sukeforth was a retail merchant doing business at Nevada City; that in August, 1888, he had on hand a stock of goods, principally furniture and carpets, the accumulation of that nine years, which would inventory at a cost price, with freight added, at about $6,000, with a lot of book accounts of uncertain value, and a small amount of other personal property not exempt from execution, and was in debt to wholesale merchants between $5,000 and $6,000, beside the indebtedness due to his brother, L. M. Sukeforth, and to some others. It is also shown in the evidence, without material conflict, that by reason of the age of the goods, the patterns being out of date, and many of them shopworn and remnants, and of the state of the market, the stock was not worth at Nevada City over fifty cents on the dollar

of its cost price. It is also shown, and uncontradicted, that on the fifteenth day of August, in that year, L. M. Sukeforth made to E. G. Sukeforth, the plaintiff, a bill of sale of this entire stock, and of all his book accounts and personal property not exempt from execution, and put the vendee in possession, himself leaving the premises and going to Sacramento; that E. G. Sukeforth remained in the exclusive possession, and was actively engaged in trying to sell off the property and close out the business, until some time afterward, when the stock was seized on attachment against L. M. Sukeforth, as above mentioned. The actual consideration of this sale to plaintiff was shown to have been in part an indebtedness actually due to the plaintiff, and upon which plaintiff was then threatening to attach if settlement could not be made; in part certain indebtedness due to other persons, which the plaintiff then assumed, and afterward actually paid, either in cash or by giving his own notes therefor, and in part cash paid at the time by plaintiff to the vendor, and amounting in the aggregate to $2,845. From the relationship of the parties; from what he insists was inadequacy of consideration; from the fact that L. M. Sukeforth was insolvent; and from the fact that this sale was made without taking an account of stock and accounts, or making a formal inventory of the goods and property conveyed—appellant argues that this sale to respondent was fraudulent, and made with intent to hinder, delay, and defraud the creditors of L. M. Sukeforth. Upon this proposition he makes a very plausible argument, and selects many disconnected passages from the testimony which would tend to support it; but at the same time it appears that the evidence upon that subject is conflicting, and it therefore follows that, under the rule of this court announced in nearly three hundred cases, the verdict of the jury ought not to be disturbed. For this reason, as well as for the one announced in response to the next point, we are not disposed to discuss this evidence to the extent that we might otherwise feel called upon to do.

Another point made is that the court erred in its rulings as to the admissibility of certain evidence. We have examined the exceptions upon this point which are urged in the appellant's brief, and fail to perceive any prejudicial error; but, even if there were error, the appellant is not in position to

avail himself thereof in this case, or of the point of insufficiency of evidence on the question of fraud in the transfer by L. M. Sukeforth to the respondent. It is conceded, even by the appellant, that an insolvent debtor, in the absence of any adjudication of insolvency, has the right to pay one or more creditors in preference to others, and to dispose of his property for that purpose, if it is fairly done, the transfer is bona fide, and not made under a secret trust, or to secure a personal advantage to himself, nor with intent to hinder, delay, and defraud his creditors generally. All the questions upon which these rulings claimed to have been erroneous were made were propounded to prove fraud, and want of bona fides in the transaction between L. M. Sukeforth and the respondent; and this, also, is the point upon which it is claimed that the evidence was insufficient to justify the verdict.

The appellant was not in position to avail himself of the question of fraud in this transfer. There was neither in law nor in fact any issue upon the subject under the pleadings. It follows that if there was error in this regard it was not material error. The complaint alleged title and possession in the plaintiff at the time of the seizure by defendant, and the proof sustained it. To overcome this, it was incumbent upon the defendant to prove fraud and want of bona fides in the transaction by which the plaintiff became the owner and in possession. He was not entitled to prove it, unless he had laid the proper foundation therefor in his pleading. The only attempt at laying the foundation for such proof in his pleading was as follows: "That the defendant is informed and believes, and upon such information and belief so avers the fact to be, that on or about the fifteenth day of August, 1888, while said L. M. Sukeforth was so as aforesaid engaged in business, and while he was so as aforesaid indebted, he, said L. M. Sukeforth, and the plaintiff, who is his brother, conspired together for the purpose and with the intent to hinder, delay, and defraud the creditors of said L. M. Sukeforth out of their just debts and demands against him, said L. M. Sukeforth; and with such purpose and intent said L. M. Sukeforth made a pretended, false, and fraudulent sale of the property mentioned in plaintiff's complaint, and of all other property save such as is by law exempt from execution, owned by said

L. M. Sukeforth, to the plaintiff, and with such purpose and intent the said plaintiff received said pretended false and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise." By this pleading the defendant alleges a conclusion only. He concludes what constitutes a fraud, instead of stating the facts, and allowing the court to conclude whether they constitute fraud or not. This form of pleading has been held, in a long line of decisions by this court, to be insufficient. All the epithets, and much of the exact language, used in this answer, will be found in the complaint in Pehrson v. Hewitt, where a judgment by confession was sought to be set aside on the ground of fraud. It was fully considered by the court in bank (79 Cal. 598, 21 Pac. 950), and held that it did not state facts sufficient to constitute a cause of action; that the facts showing the fraud must be made to appear by averment. The question was again considered in Albertoli v. Branham, 80 Cal. 633, 13 Am. St. Rep. 200, 22 Pac. 404, a case almost exactly like the present one, except that the pleading was less objectionable than this; but it was held to be insufficient—that, in pleading fraud, it is not sufficient to allege it in general terms, but the facts constituting the fraud must be stated. That case is decisive of this, so far as the sufficiency of this pleading is concerned. Because of its insufficiency, the defendant is not entitled to be heard to impeach the bona fides of the sale to plaintiff.

Appellant also assigns as error certain rulings of the court in giving and refusing instructions to the jury. He is not entitled to be heard upon these assignments, for the reason that he saved no exception to such rulings. After the case was given in charge to the jury, counsel did step up to the judge, and say to him that he desired certain exceptions entered; to which the judge replied: "Have any exception entered that you desire." Counsel then said: "Shall I have the clerk enter them?" to which the judge replied: "If you choose, do so." But he never did have any exceptions entered, either by the court or the clerk, and never prepared or had settled any bill of exceptions. This is in no sense a compliance with the statute, and does not entitle the party to a review of the rulings. Judgment and order affirmed.

I concur: Paterson, J.

WORKS, J.—I concur in the judgment, but do not agree to what is said in the opinion of Mr. Justice Fox as to the manner of entering an exception to the giving of instructions. I think the record sufficiently shows that the exceptions were properly taken, and in time. It was enough that the judge was notified that the appellant excepted, and the record shows that this was done. It was not necessary that the exception should have been entered at the time by either the judge or the clerk.

EMHOFF et al. v. McMANN.

No. 12,752; March 7, 1890.

23 Pac. 302.

Frivolous Appeal.—Where, on Failure of an Appellant to Appear when his cause is called, and the judgment appealed from is affirmed, with damages for frivolous appeal, on motion of respondents, there being no brief on file, and it thereafter appears that failure to file a brief was due to appellant's ignorance that his cause was on the calendar, and an examination of the record shows that the appeal was not frivolous, that part of the judgment imposing damages for frivolous appeal will be set aside.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

On application for rehearing. No opinion was rendered on previous affirmance of the judgment.

Vincent Neale for appellant; F. J. Castlehun for respondents.

PER CURIAM.—This cause was regularly on the January calendar, 1890. When it was reached in due course and called for hearing, the appellant failed to appear, and no brief being on file, on motion of counsel for respondents, and his suggestion that the appeal was frivolous, the judgment and order appealed from were affirmed, with damages. In making this order, the court acted upon the assumption that

the appellant had voluntarily abandoned his appeal, and, as parties do not ordinarily abandon their appeals when there is even a plausible ground to support them, we were forced to conclude that this appeal had not been taken in good faith. It now appears that the failure of appellant to file a brief was due to his ignorance of the fact that his cause was on the calendar, and an examination of the record convinces us that the appeal was not frivolous. So much of the judgment, therefore, as imposes damages for a frivolous appeal is erroneous, and is hereby set aside. We do not think, however, that counsel has offered an excuse for his failure to note the time his cause was set for hearing sufficient to justify us in ordering a rehearing in bank. Rehearing denied, but the judgment is modified to one of affirmance simply, without damages.

SMITH et al. v. PHENIX INSURANCE COMPANY.*

No. 13,514; March 10, 1890.

23 Pac. 383.

Insurance—Change of Title.—To Put a Lessee in possession of insured property under a contract that he shall buy the property on the termination of the lease, or, at his option, at any time during its continuance, is a breach of a condition of the policy that it shall become void if any change takes place in the title or possession.

Insurance—Change of Title—Lease.—Notice to the insurance company, before destruction of the property by fire, of the lease and change of possession, but not of the agreement to convey contained in the lease, cannot affect the company's right to afterward insist on the enforcement of such stipulation.

Paterson, J., dissenting.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Van Ness & Roche for appellant; Barclay, Wilson & Carpenter for respondents.

*For subsequent opinion in bank, see 91 Cal. 323, 25 Am. St. Rep. 591, 27 Pac. 738.

WORKS, J.—This was an action on a policy of fire insurance. Trial by the court, and finding and judgment for the plaintiffs. The defendant appeals from the judgment, and the case comes up on the judgment-roll. The policy sued on contained the following clause: "If the interest of the assured in the property be other than an absolute fee simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if the building insured or containing the property insured by this policy stands on leased ground, or if there be a mortgage or other encumbrance thereon, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void. When the property shall be sold or encumbered or otherwise disposed of, written notices shall be given to the company of such sale or encumbrance or disposal, and its assent thereto indorsed thereon; otherwise this insurance on said property shall immediately terminate. . . . . If the property be sold or transferred (in whole or in part) or upon the commencement of foreclosure proceedings against or a sale under a deed of trust, or the existence of a judgment lien upon, or the issue or levy of an execution against, any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance, or if the title or possession shall be changed from any cause whatsoever, ... then there shall be no liability whatever under this policy for any loss or damage resulting from fire or fires, whether such loss or damage be immediate or remote." Subsequent to the issuance of the policy, the assured leased the property to one Jerome D. Stewart for the term of five years, and the lease also contained an agreement between the respondent and said Stewart for the sale of said property, as follows: "It is further agreed that said party of the second part may, at any time during the said term of five years, purchase said hotel, lots, and premises for the sum of $25,000 cash, and likewise purchase said carpets, gas fixtures, and range at cost price. It is further agreed that said party of the second part will purchase

said hotel, lots, and premises on or before five years from this date for the sum of $25,000, together with the said carpets, gas fixtures, and range at their cost price." It was further agreed that the said Stewart should pay one-half of the insurance on the property. Stewart took possession under this lease.

It will be observed that the policy is rendered void if at the time of the issuance thereof any other person or persons have any interest whatever in the property. So if, "after the policy takes effect, the property be sold or transferred, ... or any change takes place in the title or possession, ... or the title or possession shall be changed from any cause whatsoever." The sole question in the case is whether the contract above mentioned, and the change of possession thereunder, was within these prohibitions, and worked a forfeiture of the policy. These forfeiture clauses in the policy should be strictly construed, and, where the prohibition is against a sale or alienation or conveyance of the property, an agreement to sell is not within its terms: Hitchcock v. Insurance Co., 26 N. Y. 68; Jackson v. Insurance Co., 23 Pick. (Mass.) 418, 34 Am. Dec. 69; Gingrich v. Foltz, 19 Pa. 38, 57 Am. Dec. 631; Masters v. Insurance Co., 11 Barb. (N. Y.) 624; Orrell v. Insurance Co., 13 Gray (Mass.), 431; Trumbull v. Insurance Co., 12 Ohio, 305; Hill v. Protection Co., 59 Pa. 474; Insurance Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149. And it has been held that, so long as the assured retains an insurable interest in the property, he is entitled to recover to the extent of such interest: Stetson v. Insurance Co., 4 Mass. 330, 3 Am. Dec. 217; 3 Kent's Commentaries, 262; Trumbull v. Insurance Co., supra.

But the question before us is not whether there had been a sale, alienation, or conveyance of the property, or whether the assured had an insurable interest at the time of the loss, but whether "any change" had taken place in the title or possession. About this it seems to us that there can be no doubt. The agreement between the parties gave the vendee the option to buy at any time during the five years for which his lease ran, and absolutely bound him to buy and pay the purchase money at the end of that time. This gave him an equitable title in the land: De Rutte v. Muldrow, 16 Cal. 505–512; Hall v. Center, 40 Cal. 63; Dowd v. Clarke, 54 Cal.

48; Pelton v. Insurance Co., 77 N. Y. 605; Davidson v. Insurance Co., 71 Iowa, 532, 60 Am. Rep. 818, 32 N. W. 514; Germond v. Insurance Co., 2 Hun (N. Y.), 540; Ramsey v. Insurance Co., 2 Fed. 429; 2 Amer. Law Reg., N. S., 438; Moore v. Burrows, 34 Barb. (N. Y.) 173.

If an attempt had been made to recover the possession of the property during the term for any violation of the terms of the lease, he could have defeated such recovery by exercising his option to buy. He was entitled, under his agreement, to continue in the possession of the property either before or at the end of his tenancy by paying the purchase money, and upon such payment he would have been entitled to a conveyance. Having bound himself absolutely and unconditionally to purchase and pay for the property at the end of his tenancy, he would have been bound to purchase and make such payment, notwithstanding the destruction of the building by fire: Davidson v. Insurance Co., supra; McKechnie v. Sterling, 48 Barb. (N. Y.) 330. His only right would have been to look to the respondent for the insurance if it had been paid. It has been held that in such cases the insurance recovered belongs, in equity, to the vendee, and that the vendor holds it in trust for him: Reed v. Lukens, 44 Pa. 200, 84 Am. Dec. 425. Therefore, there was not only a change in the title, but a very important and material one, which took away from the respondent, in a great measure, the incentive everyone has to preserve his property and prevent its loss by fire. In some of the cases it is held that such a contract constitutes a sale of the property, where, as in this case, nothing is to be done on the part of the vendor but to execute the deed: Davidson v. Insurance Co., supra. In this case the court said: "The precise language of that portion of the policy which is alleged to have been violated is in these words: 'In case any such property shall be sold, conveyed, or encumbered . . . . without the written consent of this company is obtained, ... this policy shall immediately thereafter be null and void.' It is manifest from the above that the policy contemplated that there might be a sale without a conveyance. The provision is the same as if the word 'or' had been expressed between the words 'sold' and 'conveyed,' and as if the policy read: 'In case any such property shall be sold or conveyed,' etc. In either case the policy

would be void. We come, then, to the question as to whether, where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate, within the meaning of the policy. In answer to this question we have to say that we think it does. Lint was the real owner of the house that was burned. The loss was his loss. The plaintiff lost nothing, unless he needed the house for security. If Lint is responsible, or the property without the house is sufficient security for the balance of the purchase money, the plaintiff's claim can be collected, and he will have all that he would have had if the house had not been burned. If he is allowed to collect the insurance and the purchase money both, he will profit by the destruction of the property. That the insured shall not by his own voluntary act come to have an interest in the destruction of the insured property is forbidden, not only by public policy, but by all the maxims of insurance, and is precisely what this defendant attempted to guard against."

It is uniformly held that a vendee in possession under an agreement to purchase real estate is in equity the owner of the property, subject to the payment of the purchase money; and the vendor a trustee, with the right to hold the legal title until payment thereof, and then to convey to the vendee: Baldwin v. Pool, 74 Ill. 97; Roberts v. Wilkinson, 34 Mich. 138; Derr v. Dellinger, 75 N. C. 300; King v. Ruckman, 21 N. J. Eq. 599; Holbrook v. Betton, 5 Fla. 99. And such an interest will be regarded as an absolute interest, where the assured has represented his interest to be such: Hough v. Insurance Co., 29 Conn. 10, 76 Am. Dec. 581; Millville Mut. Fire Ins. Co. v. Wilgus, 88 Pa. 107; East Texas Fire Ins. Co. v. Dyches, 56 Tex. 565; Franklin Fire Ins. Co. v. Crockett, 7 Lea (Tenn.), 725. The respondent could not have conveyed the property to another, even if the agreement could be construed as one not, in terms, binding him to convey. If the contract left the purchase at the option of Stewart, the respondent could not convey away the property

until the time for exercising such option had expired: Kerr v. Day, 14 Pa. 112, 53 Am. Dec. 526. In this case the purchase was not left to the option of the vendee. He had the option to buy at any time before the expiration of the term, but was bound absolutely to purchase at the end of his term. We think it is clear, therefore, that there was such a change of title here as to avoid the policy. The fact that the agreement to convey was coupled with a lease of the property, under which alone the vendee might have taken possession, does not seem to us to be at all material. The equitable title passed, and he was as much in possession under the agreement to convey as under the lease. The court found that the appellant had notice before the loss that Stewart was in possession of the property under the lease, but that it had no knowledge of the fact that the agreement to convey was contained in such lease. We do not think that such notice to the company could affect its right to insist upon the enforcement of the express provisions of its contract, or constituted a waiver of such right. Judgment reversed, with instructions to the court below to render judgment on the findings in favor of the defendant.

We concur: Beatty, C. J.; Fox, J.; Sharpstein, J.

I dissent: Paterson, J.

THORNTON, J.—I concur in the judgment, on the ground that there was a change of possession by the lessee's (Stewart's) taking possession under the lease, and when this change took place all liability under the policy sued on was, by its terms, at an end.

KELLOGG v. COLGAN.

No. 12,895; March 25, 1890.

23 Pac. 526

Appeal.—Where the Evidence is Conflicting, an order granting a new trial will not be disturbed on appeal.

APPEAL from Superior Court, Sonoma County; John G. Pressley, Judge.

S. K. Dougherty, Albert G. Burnett and R. F. Crawford for appellant; E. S. Lippitt for respondent.

SHARPSTEIN, J.—This is an appeal from an order granting plaintiff a new trial in an action for the conversion, by the defendant, of a mare alleged to belong to plaintiff. The answer of the defendant denies all the allegations of the complaint, and for a further defense alleges that the mare was taken by him as sheriff of Sonoma county upon an execution against one Merchant, in whose possession the mare then was. The verdict of the jury was in favor of the defendant. Plaintiff moved, upon a statement of the case, for a new trial, which was granted, and, as before stated, this appeal is from that order. We cannot disturb the order. The evidence is conflicting Order affirmed.

We concur: McFarland, J.; Thornton, J.

STAPLES v. MAY.*

No. 12,167; March 31, 1890.

23 Pac. 710.

Mortgage Foreclosure—Receiver.—Where a Mining Company operates its various mines under one system, and the proceeds of the ore extracted from each are used indiscriminately, for the common benefit of all, a receiver appointed on the foreclosure of mortgages covering a part only of the company's property, with power to take

*For subsequent opinion in bank, see 87 Cal. 178, 25 Pac. 346.

possession of the mortgaged premises and to carry on the mines, who is permitted by the company to take possession of its entire property, and to work all its mines, rendering them more valuable and more capable of paying creditors, cannot be considered a trespasser, and is not personally liable to a general creditor of the company for sums realized by him from a mine not covered by the mortgage.

Mortgage—Description—Mines and Mineral Lands.—A mortgage of specifically described land, together with all the lands, mines, and minerals of every kind belonging to the mortgagor in a designated county, covers all mineral lands in that county shown by proper evidence dehors the mortgage to have belonged to the mortgagor at the time of its execution.

APPEAL from Superior Court, Santa Clara County; D. S. Belden, Judge.

T. I. Bergin for appellant; S. F. Leib for respondent.

FOOTE, C.—This appeal is taken from a judgment in favor of the plaintiff, and from an order denying the defendant a new trial. From the record, it appears that Henry May was appointed the receiver of the property belonging to the Santa Clara Mining Association of Baltimore, whose lands and property were in the county of Santa Clara in this state; that the lands owned or possessed by this association contained mines of quicksilver; that the association was without means to work the mines, by which alone its then numerous debts could be paid; and that, to that end, May was authorized by the court which appointed him to borrow money, and use and expend it in working the mines, etc. He was originally appointed receiver in an action brought by the executors of the estate of W. S. O'Brien, deceased, to foreclose a mortgage on certain specific lands of the Santa Clara Association, and to foreclose a pledge of certain bonds secured by another and second mortgage or deed in trust. Afterward, when the beneficiaries under the deed in trust, who were made parties to the action originally, intervened and filed a cross-complaint seeking to foreclose their second mortgage or deed in trust, he was appointed receiver of all the property contained in both instruments, to carry on the quicksilver mines, borrow money, etc. There were other unsecured creditors, among whom was the plaintiff, Mary E. Staples, who could not get any satisfaction for their debts out of their debtor, the Santa

Clara Mining Association, by reason of its insolvency, and the existence of the instruments above mentioned. But she brought suit against the association, obtained her judgment, and, by proceedings supplementary to the execution issued on her judgment under section 720, Code of Civil Procedure, sought the aid of the superior court to force May, the receiver, to pay her what she claimed was due her debtor, the mining association, from May, as a trespasser, in realizing money from a mine of the Santa Clara Mining Association which was not included in either of the mortgages for which foreclosure had been prayed, and in which action May was, as before stated, appointed receiver. The court below held that May, as receiver, had gone upon the property of the Santa Clara Mining Association which was not included in either mortgage; that he was not authorized to do so as receiver under the appointment of the superior court; that he did so as a trespasser; and that the net profits which he had realized out of the working of the quicksilver mine upon which he had trespassed amounted to the sum of $38,212, for which and interest he became liable to pay to the Santa Clara Mining Association of Baltimore, the mortgagor in the two mortgages, amounting in the aggregate to the sum of $46,414.84; and, being liable to that corporation, the plaintiff "is entitled to judgment against defendant for such proportion of the sum of $46,414.84, as the amount of her said judgment and interest thereon to date, to wit, $6,593.19, bears to the said sum of $55,470.70, to wit, for the sum of $5,515, and costs of suit."

The theory of the case on which the court seems to have made its findings and decision, and upon which it refused the motion for a new trial, is that the court never had any jurisdiction over the particular part of the Guadeloupe mine, the mining property of the Santa Clara Mining Association, from whence the quicksilver sold by the defendant was taken; that the receiver never had any authority to enter upon it; and that whatever sum of money resulted over and above the expenses of mining the quicksilver was an indebtedness of May, as a trespasser, to the Santa Clara Mining Association, for which he was individually responsible to them, and which, being an indebtedness accruing to them, was the subject of such proceedings as are here initiated, and he must

pay her share over to the plaintiff. This conclusion, it is contended by the appellant, is wrong, if the defendant is not justly indebted to the Santa Clara Mining Association, or if any such state of facts exists, as in equity and good conscience that association should not hold the defendant liable as trespasser; and it is urged that he should be held as one who, in the proper care of the other property of the association legally in his custody, was compelled to preserve that part of which he did have charge by the use of that of which he did not have control; thus benefiting the property of the Santa Clara Mining Association, increasing its value, and rendering it the more capable of paying the mortgage debts, and thus making it the more probable that the unsecured debts should be paid.

We think that the facts shown by the record are that, at the time of the first appointment of the receiver, all the mining property of the Santa Clara Mining Association was a part of the same system of operations; that it was all held as the mining ground, for the one common purpose of extracting quicksilver ore; that whatever quicksilver was extracted from one portion of the ground was used, indiscriminately, when sold and converted into money, for the common benefit of the whole property; that the association, being a party to these foreclosure proceedings, knew when the receiver was appointed that he would take charge of the whole property; that it was in such a condition that everything which could be gotten out of it, and every part of it, would be needed to preserve the property, and aid in paying its secured indebtedness; and that the receiver would use the whole of this property for that purpose. And, knowing all this, the mining corporation permitted him to take possession of all the property, to use it indiscriminately, to borrow money under the orders of the court, to carry on the whole mining industry, to work every part of it for the common benefit of the whole, never once protesting or objecting, but, apparently, willingly allowing all the benefit which accrued by virtue of the acts of the receiver to go to the enhancing of the value of its property, and standing by, not only without objection to, but, to all intents and purposes, approving his acts; and, so far as this record shows, the corporation is still satisfied with and acquiesces in the acts of the receiver with reference to its whole property. Those

who complain are persons to whom the mining association is indebted, and who cannot get their money unless they can show that, as a trespasser, the defendant did acts which the corporation considered a trespass, and not a benefit. The defendant, as receiver, has yet to repay many thousands of dollars of borrowed money used to develop and care for the property of the mining corporation, and borrowed under the authority of the court; yet the plaintiff claims that the proceeds of the quicksilver which the defendant extracted from one portion of the mine should go to her as the representative of the corporation whose property had been trespassed upon, and that the debts which he contracted under orders of the court, unobjected to by the mining corporation, and used to render more valuable its whole property, shall go unpaid from the proceeds of the corporation's property which this borrowed money assisted to bring into existence. The defendant has benefited the mining corporation by all his acts. That corporation was a party to the proceedings, stood by and allowed him, without any sort of check or sign or disapproval, to develop its property, make it more valuable, more capable of paying its creditors, and yet seems to affirm his acts, and makes no claim against him; but its creditors who are not secured claim that May is a willful trespasser, and should be made to hand over to them money, which they claim he wrongfully has, belonging to the mining corporation. That corporation was interested to have the property included in the McCalmont or first mortgage increased in value so as to go further toward the payment of the mortgage debt, by the preservation of such property by May; and, if he used the ore taken out of station 8 to do this, and borrowed money, and applied it to the working of the whole property, thus benefiting the mining corporation, and it sat by, and did not object to receive such benefit, but took it in silence, we cannot see that it can now hold the acts of May in the premises those of a trespasser: Wise v. Walker, 81 Cal. 11–13, 20 Pac. 293, and cases cited.

But, while this is true, there is another reason why May should not be held a trespasser, and responsible to the mining corporation. The second mortgage, or deed in trust, the one given to the Farmers' Loan and Trust Company of New York, which was a party defendant to the suit of foreclosure, and

then, by intervention and a cross-complaint, became a voluntary party thereto, was, as we think, a mortgage on all the interest in the disputed mine which the Santa Clara Mining Association had. The specific description of property set out in that conveyance did not carry any interest in the ground called "Station No. 8," from whence the quicksilver in controversy was taken, but that which follows did. It is in this language. After conveying the property described in the first or McCalmont mortgage, it reads: "Together with all and singular the property thereunto attached or belonging, situated in Santa Clara county, in the state of California, or wherever the same may be, and all the lands, tenements, mines, minerals, real and personal property, rights, privileges, and appurtenances, of every kind whatsoever, of or belonging to the said party hereto of the first part, in Santa Clara county aforesaid." "A deed is evidentiary and may be helped out by other evidence": De Sepulveda v. Baugh, 74 Cal. 468–472, 5 Am. St. Rep. 455, 16 Pac. 223. As this deed conveyed all the lands, etc., that belonged in any way to the mining corporation in Santa Clara county, all that would be necessary to make the description certain would be to show dehors the deed, by proper evidence, that the mining ground in controversy belonged at that time to the corporation: Pettigrew v. Dobbelaar, 63 Cal. 397. This was sufficiently shown; and a court had jurisdiction of the property by reason of the second mortgage or deed in trust, and the mortgagor being a party, as well as the mining corporation, to the action of foreclosure wherein the receiver was appointed. The Santa Clara Mining Association was a party to the whole proceedings. It was competent, therefore, for the court, sitting as an equitable tribunal, to settle all matters of accounting in the foreclosure suit; to adjust the whole matter, even if it involves items accruing after the commencement of the action. Station 8, from which the ore in controversy was taken, belonged to the association at the time the trust deed was executed and delivered—as much so as it ever did after that time. If the association had no title at the time the trust deed was given, it had none at the time the ore was taken out. But it did have possession and control of the land, under a claim of ownership recognized in the neighborhood; and in whatever way the land

belonged to it, or by what right, that right was carried by the deed in trust.

Upon the whole case, we do not think the court warranted in finding that May was a trespasser upon the property of the Santa Clara Mining Association, or that he is indebted to it in any sum whatever. Wherefore, we advise that the order be reversed.

We concur: Belcher, C. C.; Gibson, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is reversed.

BEATTY, C. J.—Justice Thornton is assigned to department 1 for the purpose of considering this case.

HARMON v. SAN FRANCISCO & S. R. R. CO.*

No. 12,017; May 3, 1890.

23 Pac. 1024.

Mechanic's Lien.—A Claim of Lien Filed by a Materialman against a railway company for materials furnished a contractor and his assignee, who assumed all liabilities, although it omits to show the proportion of materials furnished to each, is sufficient, under Code of Civil Procedure, section 1187, requiring that the claim state the name of the person to whom the materials were furnished. Distinguishing Hardware Co. v. Railroad Co., 22 Pac. 406.

Mechanic's Lien.—The Fact That a Claim of Lien Filed by a materialman includes more than is due him, if the error is without fraud, will not defeat his right to recover.

APPEAL from Superior Court, Marin County; E. B. Mahon, Judge.

On rehearing. For former report, see ante, p. 144, 22 Pac. 407.

J. H. Boalt, H. A. Powell and Hepburn Wilkins for appellant; Hanlon & Lippitt, O. P. Evans and Lloyd & Wood for respondent.

*For subsequent opinion in bank, see 86 Cal. 617, 25 Pac. 124.

PATERSON, J.—This cause was heard in department 1, and the judgment and order were affirmed October 4, 1889, on the authority of Gordon Hardware Co. v. Railroad Co., ante, p. 140, 22 Pac. 406 (filed on that day). By consent of counsel for the respective parties the court below, before the trial of either cause, made an order that the two actions be consolidated. When the cases were considered by this court it was assumed that the record in this case was substantially the same as the record in No. 12,030; but our attention was called to the fact in the petition for a hearing before the court in bank, and at the argument, that this assumption was not correct. The record in this case differs from the other in two material respects: In this case the evidence shows that "the work on the contract was completed on June 2, 1884." There is nothing in this record to the contrary, and we cannot, as claimed by respondent, look at any evidence in the other record to explain or contradict this testimony. Second. The description of the materials furnished in the other case was "nails, spikes, iron, steel, picks, shovels, and other like material." In this case the materials furnished are described as "lumber, timber and logging, and other like material." The first description given above was held not good because too indefinite and uncertain, part of the materials described being property for which no lien could be maintained. The case of Malone v. Big Flat Min. Co., 76 Cal. 578, 18 Pac. 772, was relied on as authority for the contention that, although the claim of lien was in part for articles not the subject of lien, the court should permit the party by proof to make the necessary segregation, throw out the value of such articles, and declare a lien for the balance. In that case there were as many claims as there are letters in the alphabet (Exhibits A to Z, Vol. XLV, 1888, Supreme Court Records, pp. 38–120), all of which were assigned to the plaintiff; and, of course, the fact that one of them was for materials not the subject of lien did not prevent a recovery of the others, which were good.

Respondent claims that the claim filed by plaintiff, and upon which this action is based, must have included material for which no lien could be maintained, because the plaintiff testified that of the lumber he furnished "there was used

$1,159.13 worth in the building of temporary houses," and $577 paid on the lumber for freight and cartage. It does not clearly appear whether there was extra material included in the claim of lien, or an erroneous statement as to the value; and, as the claim filed contained no articles except such as are the subject of lien, we cannot say that a lien for so much lumber, etc., as was actually used in the construction of the road, should be defeated by reason of this testimony. As was said in the former opinion, the bare fact that he had filed his lien for too much lumber, or set too high a price on it, would not, in the absence of fraud, defeat his right to recover.

In Hardware Co. v. Railroad Co., the department held that the failure to designate what portion of the materials were furnished to each of the contractors was fatal to the lien. Whatever may be the rule in ordinary cases where the materialman furnishes materials to several independent contractors, we do not think it was necessary for the plaintiff to segregate the amounts in the claim which he filed. Hawley was the only person with whom the company had to settle. The latter was liable only for the balance of the contract price held by it. It was in no way interested in the question how much had been furnished McDonald before the assignment. Hawley had simply stepped into McDonald's shoes, with the knowledge and consent of the company, and had assumed all liabilities. There was but one contract on the part of the defendant. On final settlement, McDonald was entitled to nothing, and we are unable to see how the company could be prejudiced by the failure to designate the amount furnished to each. No question of priority is involved herein. Where a statute required a claimant to state from whom the debt was due, it was held that a mistake in the name of the contractor would not defeat the lien if it appeared that the owner was not harmed by the error: Putnam v. Ross, 46 Mo. 337. In the case at bar the proof does segregate the amounts furnished to Hawley from that which was furnished to McDonald; so that no injury could possibly occur. In the Gordon case this was not done. In view of the facts stated, we think that the court ought not to have rejected the notice of lien. We have examined other points made by respondent, but we do not think the objections raised are

well taken. If the facts shown by the evidence of the plaintiff are true, he is entitled to have his lien declared good, at least, to an amount not exceeding the amount of the contract price in the hands of the company at the time the notice of lien was filed. Judgment and order reversed and cause remanded for a new trial.

We concur: Beatty, C. J.; Sharpstein, J.; Fox, J.; McFarland, J.; Thornton, J.

CURRAN v. KENNEDY et al.

No. 13,703; May 3, 1890.

24 Pac. 276.

Bill of Exceptions—Settlement.—Under Code of Civil Procedure, section 652, providing that, if a judge refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same, such an application will be granted where the petitioner alleges that a bill settled by the judge is not in accordance with the facts, pointing out the particulars in which it is incorrect, and the judge alleges that the bill is true.

Petition to prove bill of exceptions.

Code of Civil Procedure, section 652, provides that, if a judge refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same.

Charles F. Hanlon for petitioner; Gartlan & Curran for respondents.

PER CURIAM.—This is an application under section 652, Code of Civil Procedure, for leave to prove and to settle bill of exceptions to be used on appeal. The petition concedes that the judge has settled and certified a bill of exceptions, but alleges that the same is not a true bill, in accordance with the facts, and annexes to his petition a copy of the bill as settled, and also a copy of the pro-

posed bill. The respondent alleges that the bill as settled and allowed by him is true and correct. The case presents a direct issue between the petitioner and respondents as to the accuracy of the bill as settled; the petitioner pointing out the particulars in which he claims that it is incorrect. It seems to be a case in which the petitioner should be allowed to prove the truth of the issue thus presented. It is therefore ordered that this cause be, and the same is hereby, referred to Hon. R. Y. Hayne, a commissioner of this court, to take the proofs, and report the same, with his findings thereon, to this court.

BERSON v. EWING et al.*

No. 12,702; May 8, 1890.

23 Pac. 1112.

Malicious Prosecution—Surviving Partner—Limitations.—In an action by a surviving partner, the complaint alleged that defendants maliciously prosecuted a claim against plaintiff's firm, knowing that it was fraudulent; that, to maliciously injure said firm, they caused an attachment to be levied on merchandise thereof; that the action resulted in a judgment for plaintiff. Held, that the main cause of action set out was the malicious prosecution, and that the determination of the action in plaintiff's favor, and not the levy of the attachment, which was a mere incident, fixed the date from which the statute ran against the present action. Distinguishing McCusker v. Walker, 77 Cal. 208, 19 Pac. 382.

Malicious Prosecution—Surviving Partner.—Under Civil Code, section 2461, providing that "a partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property," a surviving partner may sue for damages to the partnership estate by reason of a malicious prosecution of a claim; the words "debts" and "claims" being here used synonymously.

APPEAL from Superior Court, City and County of San Francisco.

*For subsequent opinion in bank, see 84 Cal. 89, 23 Pac. 1112.

Royce & Crimmins for appellant; Lloyd & Wood and E. F. Preston for respondents.

GIBSON, C.—This is an action brought by plaintiff, as the surviving partner of the firm of A. Berson & Son, against all the defendants except R. E. Corson, as partners under the firm name of Ewing, Plum & O'Brien, and said Corson, to recover damages for maliciously prosecuting another suit on a fraudulent claim, and obtaining a writ of attachment thereon, and causing the same to be levied upon the property of the firm of A. Berson & Son. Two demurrers to plaintiff's complaint were filed—one by defendants Flood and Coleman and the other by defendants Plum and Corson. Both were sustained, and judgment thereupon entered for defendants. From this judgment, plaintiff appeals. The complaint is, in substance, as follows: The plaintiff and A. Berson were partners doing business in the city and county of San Francisco under the firm name of A. Berson & Son until December 24, 1883 (!), when the said A. Berson died. On or about the first day of June, 1885, the defendants other than Corson, who were then and still are partners under the firm name of Ewing, Plum & O'Brien, maliciously, and for the purpose of injuring A. Berson & Son, pretended to have a claim against the latter for a large amount of money, though they (Ewing, Plum & O'Brien) well knew that such claim was fraudulent, and did not in fact exist; and, in order to carry out their malicious intention to injure and oppress A. Berson & Son, they (Ewing, Plum & O'Brien), on the date last mentioned, conspired with defendant Corson, whereby the latter took an assignment of the fraudulent claim, and brought suit thereon in his own name, as assignee, against A. Berson & Son, in the superior court of the city and county of San Francisco. In furtherance of his conspiracy with Ewing, Plum & O'Brien, and further intending to maliciously injure A. Berson & Son, he (Corson), on the date last referred to, without cause, sued out a writ of attachment in the action brought by him, and caused the same to be levied upon the merchandise of A. Berson & Son, consisting of carpets, upholstery, and furniture, in their store in said city and county, and placed a sheriff's keeper in charge of the same. Thereafter, and be-

fore the trial of said action, the plaintiff caused the court, by its order, to bring in Ewing, Plum & O'Brien as proper and necessary parties to the action. On or about June 14, 1887, the said action was tried by the court without a jury, and resulted in a judgment on the said pretended claim in favor of plaintiff and against Ewing, Plum & O'Brien and Corson, by which judgment the attachment was dissolved. The bringing of said action and levying the writ of attachment issued therein damaged A. Berson & Son in their business and credit, and caused them to sustain loss by the stoppage of goods in transitu from New York, and by being compelled to pay attorneys' fees in obtaining a dissolution of the attachment, keepers' fees, and costs of other attachments levied upon their merchandise.

The argument of the respondent in support of the ruling of the court below is: First, that the action is barred by the provisions of section 339 of the Code of Civil Procedure, because it appears from the face of the complaint that more than two years have elapsed between the date of the issuance of the writ of attachment and the commencement of this action; second, that under section 2461 of the Civil Code, the plaintiff has no capacity, as a surviving partner, to maintain this action.

The respondents' counsel, in their first point, have evidently mistaken the scope of the complaint, by confining it to the wrongful issuance and levy of the writ of attachment. The main cause of action is for the malicious prosecution of a civil action; and all the facts necessary to maintain it appear in the complaint, to wit, that defendants maliciously, and without probable cause, prosecuted an action upon an unfounded claim against plaintiff's firm to their damage, and which action was determined in their favor: Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106; Kinsey v. Wallace, 36 Cal. 462. The writ of attachment was a mere incident of the action complained of, but the use made of it aggravated the damages which resulted from the prosecution of said action; and it is settled in this state, by Eastin v. Bank of Stockton, supra, that the prosecution without probable cause of an unfounded civil proceeding, in which a writ of attachment is not issued, is actionable on the part of anyone injured by such a proceeding. One of the essential facts to the maintenance of an action of the kind before

us is, as above stated, that the malicious suit terminated in favor of the party against whom it was prosecuted. Were this not so, the plaintiff might recover for the malicious suit, and still have judgment rendered against him in such suit. Now, the malicious prosecution complained of in this case did not terminate in favor of plaintiff's firm until June 14, 1887; and, although the record here does not disclose when the original complaint in this case was filed, it does show that the amended complaint was filed November 8, 1887, from which we must infer that the action was commenced on or prior to that date. It is therefore clear that the period of two years prescribed in section 339, subdivision 1, of the Code of Civil Procedure, within which actions of this character may be brought, had not elapsed when the amended complaint was filed. McCusker v. Walker, 77 Cal. 208, 19 Pac. 382, and Sharp v. Miller, 57 Cal. 431, relied upon by respondents' counsel to show that the cause of action here is barred by the provision of the Code of Civil Procedure above mentioned, do not apply. In the first case, the levy of the attachment complained of was made in an action which was brought by a purchaser of realty at a foreclosure sale against one of the parties to the foreclosure suit, to recover the value of the use and occupation of the realty during the period of redemption, i. e., from the date of the sale until he received his deed from the sheriff. He was entitled to the value of the use and occupation of the premises (Code Civ. Proc., sec. 707), but the writ of attachment which he caused to issue and be levied upon some personal property of McCusker was illegal; and it was held that, being illegal, the right of action for damages sustained thereby accrued when the writ was issued and levied, and that, more than two years having elapsed from that time before the action thereon was commenced, it was barred by section 339, Code of Civil Procedure. The second case is, in effect, the same as the first, and is commented on in it. It is to be observed that in each of those cases the gist of the action was the wrongful issuance and levy of the writ of attachment while in the case here the gist of the action is the malicious prosecution of an unfounded action, in which, so far as the record is concerned, a writ of attachment might have properly issued.

Section 2461 of the Civil Code, relied upon by respondents' counsel in their second point, reads as follows: "A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property." This, they claim, is the measure of the surviving partner's power. Under it, he may collect debts only, but may release or compromise claims against the partnership. Now, while the word "debt," in its legal sense, does not, like the word "claim," include a demand for damages arising from a tort, still we think they were used in the above section synonymously, and probably to avoid repetition, and that the term "debt" was intended to have an application as broad as that of the word "claim." It would indeed be strange if a surviving partner could compromise any claim against the firm, but could neither compromise nor enforce one in favor of it. By section 1585 of the Code of Civil Procedure a "surviving partner has the right to continue in possession of the partnership, and to settle its business . . . . without delay." The power to settle gives full authority to the surviving partner to do everything that may be necessary to wind up the affairs of the partnership, but he can do nothing which is not indispensable to this end: T. Pars. Partn. 388. The case of Lawrence v. Martin, 22 Cal. 174, cited by respondents, simply goes to the point that the claim, being one arising out of a tort, is unassignable. It by no means sustains the proposition that a surviving partner cannot maintain an action on such a claim for damages sustained by the partnership estate.

It therefore follows that the court erred in sustaining the demurrers to the complaint; and we advise that the judgment be reversed and the cause remanded, with directions to the court below to overrule the demurrers, and grant defendants leave to answer within the usual time.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrers, and grant defendants leave to answer within the usual time.

WHITE v. WHITE.

No. 13,331; May 9, 1890.

24 Pac. 276.

Appeal—Interlineations in Transcript—Appeal.—An appeal will not be dismissed because of interlineations in the transcript of the record.

Appeal.—An Order Allowing Alimony is appealable.

APPEAL from Superior Court, City and County of San Francisco; T. K. Wilson, Judge.

E. D. Wheeler and Barclay Henley for appellant; Henry E. Highton, H. C. McPike and J. A. Cooper for respondent.

PER CURIAM.—Respondent moves to dismiss the appeal from the judgment in this case on the ground of written interlineations in the transcript of the record. This is not ground for dismissing the appeal, nor was it so held in Green v. McMann, 79 Cal. 561, 21 Pac. 964.

There is also a motion to dismiss the appeal from an order allowing alimony. The order in this case is within the decision in Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. We adhere to the ruling in that case. The certificate of the clerk of the superior court to the transcript is in all respects sufficient. Both motions are denied.

MURDOCK v. CLARKE et al.*

No. 13,475; June 7, 1890.

24 Pac. 272.

Mortgages.—A Conveyance of Land to Secure the Payment of money, though the grantee is put in possession under an agreement for an accounting for the rents and profits, is only a mortgage, and does not pass the legal title.

*For subsequent opinion in bank, see 88 Cal. 384, 26 Pac. 601.

Mortgage — Mortgagee in Possession — Accounting. — By an agreement between a mortgagor and mortgagees, the latter were to have the sole right to the possession of the land mortgaged, accounting for the rents and profits, and were to select a person to manage the property. At an accounting against the mortgagees, the latter testified that they were to send a man to take possession, in order to take care of the personal property security, and that everything was to be run in their name. They also spoke of the man selected, both in their testimony and in the pleadings, as their agent. Held, that for the purposes of possession and accounting, such person must be considered as the agent of the mortgagees only, although his selection was approved by the mortgagor, and his salary was paid as a part of the running expenses. In such case the mortgagees are held to the exercise of reasonable diligence in the management of the property mortgaged.

Mortgage—Mortgagee in Possession—Accounting.—Where both the agent and the defendants kept their own cattle on the mortgaged land, along with the cattle of the mortgagor, the wrong done was satisfied by charging defendants with a proportion of the running expenses, and with the value of the use of the land.

Mortgage — Mortgagee in Possession — Accounting.—Nothing was chargeable to defendants on account of horses which they sent to the land, and which were needed and used for farm work.

Mortgage—Mortgagee in Possession—Accounting.—One of the notes given by the mortgagor providing for compound interest if not paid when due, the net receipts were properly applied first to the payment of the interest on such note.

Mortgage — Mortgagee in Possession—Accounting.—Sums advanced to the wife of the mortgagor without any order from him were not chargeable against his estate.

Pleading—Items of Account.—It not being necessary, under Code of Civil Procedure, section 454, to give an itemized account in pleading, the findings need not give the items of the account.

Sale—Estoppel from Accepting Bill of Sale.—One who accepts a bill of sale purporting to transfer a certain number of cattle is not estopped thereby from denying that he actually received that number.

Appeal—Presumptions.—As Against Respondents on appeal, the findings of the lower court must be presumed to be true. It will not be presumed that an error was the result of inadvertence.

APPEAL from Superior Court, Lassen County; Phil W. Keyser, Judge.

J. D. Goodwin, D. W. Jenks and W. N. Goodwin for appellant; A. L. Hart and S. Solon Hall for respondents.

HAYNE, C.—This is the second time that this case has been before the court on its merits. The action was by the administratrix of a mortgagor against the mortgagees in possession under an agreement for an accounting of the rents and profits, and to redeem the property. The trial court adjudged that there was due to the defendants the sum of $31,926.37; that upon payment thereof the defendants should reconvey the real property and redeliver the personal property; and that, if the plaintiff should fail to make such payment within thirty days, the property should "vest absolutely in the defendants." The plaintiff appeals from the judgment, and from an order denying a new trial.

The following facts are undisputed: On February 4, 1875, Adam Murdock, the plaintiff's intestate, borrowed from the defendant Clarke the sum of $8,500, and gave his note therefor, to become due one year after date, with interest at the rate of one and one-quarter per cent per month, payable semi-annually, and, if not so paid, to be compounded. To secure the payment of this note, Murdock made a deed to Clarke of a tract of three hundred and thirty acres known as the "Beaver Creek Ranch," and assigned to him a certificate of purchase of a tract of four thousand three hundred and sixty acres, situated about twenty miles from the first, and known as the "Big Valley Ranch." Soon after this, Clarke assigned to the defendant Cox a half interest in this note and security. Shortly afterward, viz., on March 22d of the same year, Murdock borrowed from Clarke and Cox a further sum of $5,000, and gave his note therefor, bearing interest at one and one-half per cent per month. In order to secure the payment of this latter note, and to further secure the payment of the first note, and of such additional sums as should be advanced, it was agreed that Clarke and Cox should take possession of the two ranches, and of the cattle and other personal property thereon, and out of the rents and profits should pay the running expenses, and apply the balance to the liquidation of the amount due to themselves. The property was to be managed by a person to be selected by the defendants, but whose salary was to be paid as part of the running expenses. Murdock had permission to reside upon the property, and assist in the work, but was not to exercise any control. It was also agreed that,

as further security, Murdock should assign to Clarke and Cox a half interest in a portable sawmill, then on public land, together with the machinery, etc., then owned by him in partnership with one Quinn, who was the manager thereof. In pursuance of this agreement, the defendants, with the approval of Murdock, selected one Stanton to manage the property, and he went there on March 22d; but the formal bill of sale was not made out until April 10th. On the next day after the execution of this bill of sale, the defendants advanced, at the request of Murdock, the sum of $3,176.45, for which he gave his note bearing interest at one and one-half per cent per month; and subsequently further advances were made. Murdock remained upon the property until the following December, at which time he died. About eight months thereafter the plaintiff was appointed administratrix of his estate. The property continued to be managed by Stanton until May, 1886, at which time he died, and one Snell was appointed by the defendants as his successor. During the period of Stanton's management, he received various sums of money from sales of cattle, etc., out of which sums he paid the running expenses, and gave the remainder to the defendants. During a considerable portion of the time the defendants had cattle of their own upon the ranches, and Stanton kept his own cattle there also. They were not kept separate from the Murdock cattle, but all were taken care of together. The accounting sought embraces the whole period, and various charges of neglect and misfeasance are made.

A fundamental question in the case is as to the capacity in which Stanton acted. The defendants contend that he was the agent of both sides, and consequently that neither is responsible to the other for his acts, while the appellant contends that he was the agent of the defendants only. We think that the latter position is correct. Until recently the defendants seem to have understood that Stanton was their agent. At the first trial of the case Clarke testified as follows: "We were to send a man to take possession of the property, take a bill of sale of the stock, and everything was to be run in our name." And at the last trial the same defendant testified as follows: "I told Adam Murdock we would have to have a man go there and take possession,

or the personal property security would be no good." The other defendant testified at the first trial as follows: "I had the real estate possession of everything. I was put in possession of everything. Question. Everything he had; for what purpose? Answer. For the purpose that he told me—that during the year he would pay off the debt, and if not we were to hold the property, and manage it until we got our money." This testimony accords with the circumstances of the case. It is admitted that the agreement gave to the defendants the sole right of possession of the ranches, and we do not understand them to maintain that they did not exercise all their rights under the agreement, so far as the ranches are concerned. But it is not pretended that they had possession in any other way than through Stanton; and we think it follows that, for the purposes of possession, and all its consequent responsibility, Stanton must be held to have been their agent; and at the first trial the defendant Clarke testified distinctly that such was the case. He was asked this question: "This man Stanton was the agent of you and Murdock in taking charge of the property?" And he answered: "No, sir; he was my agent." Furthermore, Stanton seems to have always taken his orders from the defendants; and we do not think that all this is outweighed by the fact that his wages were to be paid as part of the running expenses, or by the fact that his selection was approved by Murdock, or by both circumstances together. But the matter is put beyond doubt by the defendants' answer, which avers "that according to such agreement the defendants, on or about the first day of April, 1875, through their agent, Stanton, took possession of the said two ranches, and have ever since run and operated the same, and are now in possession thereof." Even without this averment, we think that, upon the evidence, Stanton must be held to have been the agent of the defendants only. As we construe the findings, however, the court below did not take this view of Stanton's capacity, but held that he was the agent of both sides; and this is the construction of the counsel for the respondents, for they say: "There is nothing in the record, either in the evidence or in the findings, which would justify the inference that, by their contract, Clarke and Cox assumed to become

responsible for the management of the Murdock estate." And they devote several pages to an argument to show that Stanton was the agent of both sides, and consequently that neither was responsible to the other for his acts. It thus appears that the court took the account upon a fundamentally wrong principle. This must have had an important influence upon the result, and there are several injurious consequences which we can see that it did have. In the first place, the court charged the defendants with the value of the use of the property "for their own stock" only, whereas, if Stanton was their agent, they were responsible for his acts, and should have been charged with the value of the use of the ranches for the stock that he kept there. In the next place, they should have been charged with a proportion of the expense of the care, etc., of Stanton's cattle. Upon the former appeal, it was held that they must be charged with a proportion of the expense of the care, etc., of their own cattle (59 Cal. 695, 696); and they were so charged by the court below. But for this purpose their agent's cattle must be considered as theirs. Except in the single item of hay, however, they were charged only with a proportion of the expense of their own cattle, and not for those of Stanton. This is apparent from the transcript, where the defendants' cattle are identified as having been bought from one Ames, and they are charged with one-third of the expenses, because such was the proportion of the Ames cattle to the Murdock cattle; and it is expressly stated that it was "upon the principle of this finding" that the proportion of the expenses was determined. These are consequences which can be seen to have resulted from the erroneous principle upon which the court proceeded. But the principle is so fundamental in the accounting that, even if no injurious consequence affirmatively appeared, we think the case would be within the rule that, where error is clearly shown, injury is presumed, unless the contrary appears: See cases collected in Hayne on New Trial and Appeal, sec. 287.

There is another error in the findings, not flowing entirely from the erroneous principle upon which the court proceeded, but somewhat broader. It is perfectly plain that the defendants should have been charged with a propor-

tion of the taxes upon the cattle, as well as of the other expenses. But the court expressly excludes the taxes from the amount to be deducted from the running expenses. The respondents' counsel say in reference to this that "the words 'and taxes' were evidently inadvertently put into said finding." But, although the error is plain, we do not see upon what basis it could be set down to inadvertence. As against the respondents, the findings must be presumed to be true; and that an error is the result of inadvertence will not be presumed, but must be made to appear: Carpenter v. Superior Court, 75 Cal. 598, 19 Pac. 174; Wunderlin v. Cadogan, 75 Cal. 619, 17 Pac. 713.

We have considered whether the judgment could not be modified so as to avoid the consequences of the errors above referred to. But the findings afford no basis for such a modification, even as to the injurious results which affirmatively appear. For example, it is not found what was the number of Stanton's cattle, nor how long he kept them on the property. In the judgment of the writer of this opinion, it would conduce to the better administration of justice if the appellate court could look into the evidence for the purpose of modifying a judgment to avoid the consequences of any error that may have crept into the proceedings. But, while it may look into the evidence to see if it sustains the findings, or to ascertain and declare the principles of law which apply to the case, it is settled that it cannot resort thereto for the purpose of making findings to serve as a basis for a modification of the judgment: Ellis v. Jeans, 26 Cal. 278; Carpentier v. Gardiner, 29 Cal. 164; Hayes v. Martin, 45 Cal. 563. And in addition to this, as above remarked, we cannot see that the erroneous principle upon which the court proceeded did not have injurious consequences which do not appear.

There is also a radical error in the decree. The court adjudged, in effect, that the legal title passed to the defendants, and it gave to the plaintiff a certain time in which to redeem, failing which the property was to vest absolutely in the defendants. But, as it is admitted that the conveyances were intended only to secure the payment of money, they were mere mortgages, and did not pass the legal title. "It is the settled rule in this state that, if a

deed absolute in form was made merely to secure an indebtedness [to the grantee], it is a mere mortgage, and does not pass the title": Smith v. Smith, 80 Cal. 325, 21 Pac. 4, 22 Pac. 186, 549. See, also, Hall v. Arnott, 80 Cal. 352, 22 Pac. 200; Booth v. Hoskins, 75 Cal. 275, 17 Pac. 225; Raynor v. Drew, 72 Cal. 309, 13 Pac. 866; Healy v. O'Brien, 66 Cal. 519, 6 Pac. 386; Taylor v. McLain, 64 Cal. 514, 2 Pac. 399. And the fact that the mortgagees were put in possession does not change the rule. As was said in Smith v. Smith, above cited, "such a deed gives a mere lien upon the property, just as if the parties had put their agreement in the form of a mortgage"; and it has been decided that, in this state, the interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage: Dutton v. Warschauer, 21 Cal. 609. The legal title, therefore, remained in Murdock, and vested in his heirs, and is not in the defendants; and the court below was not authorized to decree that it should vest absolutely in the defendants upon the failure of the plaintiff to pay what was due within a certain time. The defendants, however, have a right to retain possession until the sums due to them have been paid; and, even if they have not, the court has power to impose proper conditions upon the plaintiff: Raynor v. Drew, 72 Cal. 311, 13 Pac. 866; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 134, 22 Pac. 74. And the answer prays that the property be sold, and the proceeds applied to the payment of the debt. The decree, therefore, ought to have provided that, in case of the failure of the plaintiff to pay what was due within a specified time, the property should be sold, and the proceeds applied to the payment of whatever is due to the defendants.

As the case must go back to the court below, it is proper to dispose of certain other questions which will arise upon a retrial, and which have been argued.

1. It is contended for the appellant that the defendants were trustees, and were therefore bound to account as such, and are held to the same strict responsibility in the management of the property committed to their care. It is true that mortgagees in possession are often spoken of as "trustees." But they are so only in a limited sense: Ten Eyck

v. Craig, 62 N. Y. 422; Clarke v. Sibley, 13 Met. (Mass.) 213; Cholmondeley v. Clinton, 2 Jac. & W. 184; 1 Hill, Mortg. 391. As remarked by Shaw, C. J., in reasoning to a somewhat different point: "In some very limited respects, a mortgagee is a trustee; as when he has entered, and is in the receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a 'trustee' ": King v. Insurance Co., 7 Cush. (Mass.) 7, 54 Am. Dec. 683. That they are bound to account for the rents and profits is a matter of course: 2 Story, Eq. Jur., 13th ed., sec. 1016a; Raun v. Reynolds, 15 Cal. 471. And we think that the rule as to trustees in general, viz., that their accounts should be clear, distinct, and accurate, and that all obscurities and doubts should be resolved against them (2 Perry, Trusts, 4th ed., sec. 821), applies here. But the accounting is not to be extended to imaginary profits. Where no negligence or improper conduct is alleged, a mortgagee in possession is chargeable with what he has actually received, and no more: Benham v. Rowe, 2 Cal. 407, 56 Am. Dec. 342. In this case, negligence and improper conduct are charged, and various claims are based thereon. It is therefore necessary to consider what was the degree of care required of the defendants. Chancellor Kent, in his Commentaries, stated the rule as follows: "If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced or lost by his willful default or gross negligence. By taking possession, he imposes upon himself the duty of a provident owner; and he is bound to recover what such an owner would, with reasonable diligence, have received": 4 Kent's Commentaries, 166. This statement of the rule has found its way into the decisions of the courts, and the treatises of text-writers (see Hidden v. Jordan, 28 Cal. 309; Moshier v. Norton, 100 Ill. 68), and a similar passage was quoted from a modern text-writer on the former appeal of this case (59 Cal. 694); but it cannot be determined from the opinion whether the court meant to establish a rule or not. But, if the term "gross negligence" is to be taken in its ordinary sense, viz., as denoting the

absence of slight care (see Shear. & R. Neg., 4th ed., sec. 49), it is manifest that the passage quoted is somewhat inconsistent; for, if the mortgagee, by taking possession, "imposes upon himself the duty of a provident owner, and is bound to recover what such an owner would with reasonable diligence have received," it is evident that he is bound to something more than slight care, and is responsible for something less than gross negligence. What we think the passage means, when taken as a whole, is that the mortgagee in possession is bound to exercise reasonable care, and is responsible for the want thereof. This was the construction given to similar language by a comparatively recent case in Alabama. The court said: "On a bill to redeem, a mortgagee in possession will not be held accountable for anything more than the rents actually received, unless there has been willful default or gross negligence, which in such case is the measure of reasonable diligence": Gresham v. Ware, 79 Ala. 199. That reasonable diligence is required, is laid down in several cases: Shaeffer v. Chambers, 6 N. J. Eq. 548, 47 Am. Dec. 211; Strong v. Blanchard, 4 Allen (Mass.), 543, 544; Scruggs v. Railroad Co., 108 U. S. 375, 27 L. Ed. 756, 2 Sup. Ct. Rep. 780. It seems plain, upon principle, that the mortgagee in possession is bound to something more than slight care. And we think that Chancellor Kent, and the courts and writers who adopted his language, meant to say that reasonable care was required. Applying this rule to the case before us, we think that the evidence shows, without material contradiction, that, while there were some errors of judgment, the general management of the property was what was required. Especially does this appear when it is considered that it was agreed that the ranches were to be run as they had been by the mortgagor. This does not mean that, if the mortgagor was negligent as to any matter, the mortgagees should be so, too, but that the management of the mortgagees should be on the same general lines as that of the mortgagor; and, as above stated, we think it was.

2. Much argument is based upon the undoubted fact that both Stanton and the defendants kept their own cattle upon the ranches, not separate from the Murdock cattle, but together with them. This was certainly wrong. But it

was settled on the former appeal that it made them liable for a proportion of the running expenses (59 Cal. 695, 696); and, in addition to this, the court below allowed the value of the use of the land. This, we think, was all that could properly be charged against the defendants on this account. In addition to the cattle, the defendants sent some horses to the property. This was because the horses were needed for ranch work, and they were used for that purpose. This was for the benefit of the property, and nothing can be charged against the defendants by reason thereof. Similar remarks apply to the stallion. He was useful as a work-horse, and for breeding the ranch mares. The money made from outside parties during the breeding season belonged to the defendants.

3. Part of the property mentioned in the bill of sale was a half interest in a portable sawmill located upon public land, and owned by Murdock in partnership with one Quinn. No profits were ever made from this mill, and it does not clearly appear what finally became of it. It was moved once while Quinn was in control. Afterward, it was moved again, and it seems that one Harris "took it." The court below found that the defendants never had possession, and the evidence leads us to the same conclusion. The defendants incurred no liability to Murdock or his estate by not taking possession; for it was as much his duty to deliver it to them, as theirs to receive it, and there is nothing to show that he tendered it. Even if the defendants be considered as having been in possession, we cannot say that there was a want of reasonable care on their part. Quinn was allowed, with the acquiescence of Murdock, to run it as he had been doing previous to the bill of sale. After Murdock's death, Quinn was the surviving partner, with authority to settle up the affairs and dispose of the property. He is the person who is accountable to the plaintiff in relation to the matter. The defendants are not bound to litigate with him for the benefit of the estate.

4. A point is made in relation to the number of cattle received by the defendants with the ranches. The bill of sale purports to transfer thirteen hundred and twenty-two head, and it is argued that its acceptance estopped the defendants from denying that they received that number.

There is no force in this suggestion. After the bill of sale was signed, it was Murdock's duty to deliver the cattle in accordance therewith. If he did not perform this duty to its full extent, the defendants are certainly at liberty to prove the fact.

5. As above stated, one of the notes provided for compounding the interest if not paid when due. The court below refused to allow compound interest, and the respondents contend that this was error. The theory upon which the court acted was, probably, that the receipts should have been applied first to keeping down the interest upon the note which provided for compound interest; and this, we think, was the right view. The net receipts should be applied first to the payment of the interest upon the note which provided for compound interest, and afterward to the payment of the interest upon the other sums due; and, if anything remained, it should be applied to the payment of the principal. There can be no doubt that the note bore interest from its date.

6. Some objection is made to the findings; and, for the guidance of the court below, it may be stated that it is not necessary for the findings to give the items of the account. It is not necessary to give an itemized account in pleadings (Code Civ. Proc., sec. 454), and a finding which follows the pleading is sufficient. In this, as in other cases, it is sufficient to find the ultimate facts, or secondary facts from which the ultimate fact necessarily follows.

7. Whatever sums were advanced to Mrs. Anna Murdock upon the order of the mortgagor are chargeable against the estate, but sums advanced to her without any such order are not so chargeable. Sums advanced to the widow personally cannot be charged against the estate. We therefore advise that the judgment and order appealed from be reversed and the cause remanded for a new trial.

We concur: Vanclief, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial.

MOWRY v. HENEY.*

No. 11,705; June 12, 1890.

24 Pac. 301.

Appeal Bond.—A Judgment Against a Surety on an appeal bond, rendered more than thirty days after the filing of a remittitur from the supreme court, is valid, though the surety had no notice of the motion therefor; since the undertaking, as prescribed by Code of Civil Procedure, section 942, is that, "if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor, against the sureties, for such amount together with interest." This is an express waiver of further notice.

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

R. Percy Wright for appellant; Cowdry & McCutchen for respondent.

McFARLAND, J.—Action to quiet title to certain real property situated in San Francisco. Judgment went for defendant, from which and from an order denying a motion for a new trial plaintiff appeals. Respondent claims title to the premises in contest under sheriff's sale and deed made under an execution issued upon a judgment against one Laura A. Mowry, who is the mother of plaintiff. This judgment was rendered against Laura A. Mowry on an undertaking on appeal executed by her on an appeal taken from the superior court to this court by the defendants in a certain action entitled Heney et al. v. Alpers et al. The undertaking contained the covenants provided for in section 942 of the Code of Civil Procedure. The judgment in Heney et al. v. Alpers et al.—which was for $1,344.18, with interest and costs—was affirmed by this court on March 28, 1883, and the remittitur was filed in the superior court May 3, 1883. The judgment on the undertaking was rendered on August 2, 1883—more than thirty days after the

*For subsequent opinion in bank, see 86 Cal. 475, 25 Pac. 17.

filing of the remittitur. It is admitted for the purposes of this present appeal that the judgment against Laura A. Mowry on the undertaking on appeal was rendered without any notice of the application for judgment having been served upon or given her; and it is contended by appellant that, because such notice was not given, the judgment was void. Whether or not, for that reason, the said judgment was void is the main question in this case.

We are satisfied that a judgment on an undertaking on appeal, given under section 942 of the Code of Civil Procedure, may be properly rendered against the sureties without any further notice. Such a judgment is simply in accordance with their express contract. The language of their obligation is that, "if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor against the sureties, for such amount, together with interest," etc. This is an express waiver of any further notice, a direct assumption of the result of the appeal, and a disclaimer of the necessity of any further litigation on the subject. The contract of the surety is not that he "will pay" or "will be liable" if his principal fails, but that judgment may be entered against him, on motion, for the amount which has already been adjudicated to be due from his principal. The judgment to be entered against him is nothing more than the natural and anticipated consequence of his own express undertaking. The case of Coscia v. Kyle, 15 Nev. 394, has no bearing on the case at bar. There, no contract relation whatever was involved.

Moreover, we think that the point under discussion should be taken as settled against appellant's contention by the case of Meredith v. Association, 60 Cal. 617. The very point was elaborately discussed by counsel in that case, and exhaustively considered in the opinion of the court. It is contended that the Meredith case should not be considered as binding authority, because the point was not absolutely necessary to the decision of that case. Strictly speaking, that may be so; but, as nearly as the whole force of the opinion in that case was expended on the point here involved, [illegible] certainly entitled to great consideration as authority.

Moreover, we think that the views there expressed are correct. As said in that case: "There is not in this mode of procedure anything which prejudices the rights of the parties to the action; for if, in fact, the original judgment was paid, although not satisfied of record, the parties have their remedy, under section 675 of the Code of Civil Procedure, to have satisfaction entered, and, for that purpose, to recall any execution which may have been issued against them; or they may have the judgment vacated or annulled." On this collateral attack the appellant has no standing. The case of Davis v. Heimbach, 75 Cal. 261, 17 Pac. 199, was about an entirely different section of the code, and cannot be taken as weakening the doctrine of the Meredith case.

The finding of the court that the deeds from Laura A. Mowry to plaintiff were not intended to be operative unless in the event of her death from the extreme illness from which she then suffered, was, we think, fully sustained by the evidence, and correct. The objection to the judgment-roll is not tenable. It contained all that is required to be in it. We see no material insufficiency or defect in the findings, nor do we perceive any other material error.

Judgment and order affirmed.

We concur: Paterson, J.; Sharpstein, J.; **Fox, J.**

PERKINS v. COOPER et al.*

No. 13,179; July 8, 1890.

24 Pac. 377.

Brokers—Agreement With One Executor.—Under Civil Code, section 1624, providing that an agreement authorizing an agent to sell real estate for a commission must be in writing, a real estate agent cannot recover from executors, as individuals, commissions for selling property, when the contract produced is contained in letters from one of the executors only, which show that he was acting as executor, and not individually.[1]

*For subsequent opinion in bank, see 87 Cal. 241, 25 Pac. 411.

[1] **Cited** in the note in 38 L. R. A., N. S., 777, on personal liability of officer, or referee to sell property, for brokers' services.

Appeal—Sixty Days—Bill of Exceptions.—When an appeal is taken within sixty days after judgment, a bill of exceptions, containing the evidence, may, even though there is no motion for a new trial, be looked into to determine whether it is sufficient to support the verdict under Code of Civil Procedure, section 939, providing that such exceptions cannot be reviewed unless the appeal be taken within sixty days.

Appeal—Time When Taken.—An appeal is taken under Code of Civil Procedure, section 940, when notice of appeal is served and filed, though the undertaking by which the appeal is perfected is not filed till afterward.

APPEAL from Superior Court, Santa Barbara County; R. M. Millard, Judge.

E. B. Hall, J. W. Taggart and R. B. Canfield for appellants; B. F. Thomas for respondent.

SHARPSTEIN, J.—Action to recover a broker's commission for effecting a sale of the property known as the "Arlington Hotel," in the city of Santa Barbara. Verdict and judgment for plaintiff. Defendants appeal from the judgment. The record contains a bill of exceptions which, respondent contends, cannot, in the absence of a motion for a new trial, be looked into for the purpose of determining whether the evidence is sufficient to justify the verdict. Such was the rule under the practice prior to the adoption of the code, which contains the following provision: "An exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment": Code Civ. Proc., sec. 939. The implication is that, if the appeal be taken within sixty days after the rendition of the judgment, such an exception may be reviewed: Balch v. Jones, 61 Cal. 236; In re Crowey, 71 Cal. 300–302, 12 Pac. 230. It is contended, however, that the appeal in this case was not taken within sixty days after the rendition of the judgment, because no undertaking on appeal was filed within that period of time. An appeal is taken when a notice of appeal is served and filed: Code Civ. Proc., sec. 940. The filing of an undertaking perfects an appeal, but is not a part of the taking in the statutory sense: Lowell v. Lowell, 55 Cal. 318.

Coming to the question, "Is the verdict supported by the evidence?" we are perfectly satisfied that it is not. As we construe the complaint, the action is not against the defendants as executors or trustees of the Hollister estate, but as individuals. This is expressly conceded by the learned counsel of respondent, who states in his brief that the action "was not brought against the defendants as executors of W. W. Hollister, deceased. . . . . The defendants were sued as individuals." This being so, it is difficult to see how a judgment can be sustained which is payable in the course of administration upon the estate of W. W. Hollister, deceased. Assuming, however, in favor of respondent, that this portion of the judgment ought to be treated as surplusage, and treating it as a personal judgment against the defendants, the evidence is not sufficient to support such a judgment. The complaint alleges that "the defendants, by an agreement in writing, employed plaintiff as an agent to procure for them a purchaser," etc. This allegation was denied by the answer, and it devolved on the plaintiff to prove it. The code provides that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission must be in writing: Civ. Code, sec. 1624. The only writing introduced in evidence in this case is that of defendant Cooper alone. The other defendants are clearly not liable; nor do we think defendant Cooper is. His letters show (what is apparent from all the evidence) that he was acting as an executor of the Hollister estate, and in no other capacity, and he promised nothing which could make him personally responsible: Blanchard v. Kaull, 44 Cal. 440; Haskell v. Cornish, 13 Cal. 45. There being no "note, memorandum, or writing" of any contract sufficient to bind any of the defendants, there can be no recovery against them: McCarthy v. Loupe, 62 Cal. 299; Myres v. Surryhne, 67 Cal. 657, 8 Pac. 523. Judgment reversed and cause remanded for a new trial.

We concur: McFarland, J.; Fox, J.; Paterson, J.; Works, J.

BUCKLEY v. ALTHOFF.

No. 13,824; July 28, 1890.

24 Pac. 635.

Appeal—Statement.—A Motion on the Minutes for a New Trial having been overruled, the only statement that could then be pending is a statement on appeal, and the time for that having expired, and no transcript having been filed in the time limited, the appeal will be dismissed.

APPEAL from Superior Court, City and County of San Francisco.

Hassett & Tevlin for appellant; Gunnison & Booth (Chas. J. Heggerty of counsel) for respondent.

PER CURIAM.—When the notice to dismiss the appeal in this case was given, no transcript had been filed, and the time within which the party was required to file the same had fully expired. It had not been extended by any stipulation or order of court, nor was there pending for settlement any statement on appeal or bill of exceptions, and the time for presenting such statement or bill of exceptions had passed. Appellant attempts to show that there was pending for settlement a statement on motion for a new trial, but that motion had already been heard and determined on the minutes of the court, and the only statement which could then be pending, if in time, was a statement on appeal. But no statement, either on motion for new trial or on appeal, was presented until after the notice of this motion, and the time for the presentation, even of statement on appeal, had already expired. The appeal must, therefore, be dismissed, and it is so ordered.

BOOTH et al. v. PENDOLA et al.*

No. 13,267; August 1, 1890.

24 Pac. 714.

Mechanics' Liens.—In an Action by Subcontractors to Enforce a lien for materials furnished in the erection of a building, the contract for which, between the owner and contractor, was never filed for record, a judgment for plaintiffs cannot be supported where the complaint does not allege the reasonable value of the materials, and there is no finding as to such value, though the complaint does allege the amount agreed to be paid by the contractor.

Mechanics' Liens.—Where the Materials were Furnished at the Same Time for two buildings of the same owner, while it is not necessary to file separate claims on each building, the subcontractors are not entitled to a joint lien on both buildings for the entire amount claimed.

Cope & Boyce for appellants; Thomas, Butcher & Putnam for respondents.

PATERSON, J.—This is an action brought by plaintiffs, having several liens of mechanics and materialmen, against property owned by Pendola, deceased, in his lifetime. The findings show that Pendola entered into a written agreement with one Hamilton, on March 29, 1887, for the construction of the Western Hotel in the city of Santa Barbara, and on the 15th of June entered into another contract with said Hamilton to build a cottage near said hotel, and on the same lot. Neither of these contracts was recorded. Belt & Co. furnished materials for both buildings, for which Hamilton agreed to pay a reasonable price. The court finds that the reasonable value of the materials furnished by them was $363.99. On May 2, 1887, Hamilton entered into an agreement with Backus & Heyl, by the terms of which the latter were to paint the hotel for the sum of $365, and the cottage for the sum of $135. The court finds that of these sums $131.71 remain unpaid. Lightner & Buckingham furnished

*For former report, see 88 Cal. 42, 23 Pac. 200. For subsequent opinion, see 88 Cal. 36, 23 Pac. 200.

materials for, and performed certain work on, the cottage for which Hamilton was to pay the sum of $335, and performed certain work on and furnished material for the hotel, for which they were to receive the sum of $975, of which the sum of $535.35 remains due and unpaid.

1. The complaint alleges that Hamilton agreed to pay Backus & Heyl the sums of $365 and $135, above referred to, and that he agreed to pay Buckingham & Lightner the sums of $975 for work done on and materials furnished for the hotel, and $335 on account of the cottage, but it is nowhere alleged, nor does the court find, what was the value of any of the materials furnished, or of any of the work performed. Such allegations and findings were necessary, and the judgment cannot be supported without them. The contract between the owner and Hamilton was never filed for record. It was void, and while it is doubtless true that the contract price agreed upon between Hamilton, the agent of the owner, and the materialmen and laborers, is prima facie evidence of the value of the materials furnished and labor performed, and would support a finding of value, we think that an allegation and a finding on the subject are essential to support a judgment in actions of this character.

2. The claims of lien filed by Backus & Heyl and Lightner & Buckingham both segregate and specify the particular amounts claimed to be due on each building. We do not think it was necessary for the claimants to make and file separate claims on each building; it was proper to state the amount of the claim on each building in the notice of lien, and the claimants are entitled to a lien on each building for the amounts respectively due thereon, but we do not think such claimants or their assignees are entitled to a joint lien on both buildings for the entire amounts respectively claimed by them. All other points made by appellant, and worthy of consideration, were noticed by Mr. Justice McFarland in the former opinion herein, and we are satisfied with the conclusions therein reached. Judgment reversed and cause remanded for a new trial, with directions to allow the parties to amend their pleadings as they may be advised.

We concur: Beatty, C. J.; Works, J.; Sharpstein, J.; Fox, J.

VORWERK v. NOLTE.*

No. 13,470; September 11, 1890.

24 Pac. 840.

Vendor and Vendee—Failure to Convey.—Defendant contracted to sell land to plaintiff, and stipulated that the money paid therefor was to be returned in case he failed to execute and deliver a deed "after one year from date" of the contract. It was agreed that time was of the essence of the contract. Held, that the deed was to be delivered one year from the date of the contract, and a tender of it nine days after the expiration of the year was not a compliance with the contract.

Vendor and Vendee.—An Action to Recover Such Purchase Money is not an action for the rescission of the contract, but one for money due thereunder.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

J. W. Mitchell (Chapman & Hendrick of counsel) for appellant; J. D. Bicknell and R. H. F. Variel for respondent.

SHARPSTEIN, J.—Action to recover $3,750 and interest at the rate of three per cent per month from June 24, 1887. The action is upon a contract in writing whereby the plaintiff agreed to pay, and did pay, to the defendant $3,750 for a certain lot of land which the defendant agreed to convey to plaintiff one year after the date of said contract, which was dated June 24, 1887. And on the same day, and before plaintiff paid to defendant said $3,750, defendant made and executed the following agreement, to wit:

"This agreement is to certify that I, the undersigned, promise to execute to a lot on First street, to which I executed to-day an agreement, and which has been paid in full by Mr. John Vorwerk, and, in case of failure of the undersigned to deliver and execute a deed after one year from date hereof, bind myself to refund the purchase price, three thousand seven hundred and fifty dollars ($3,750) with interest at the rate of three per cent per month.

"C. A. NOLTE."

*For subsequent opinion in bank, see 87 Cal. 236, 25 Pac. 412.

That this and the preceding agreement were parts of the same contract is found by the court, and conceded by counsel. And, being so conceded, the obvious meaning of the contract is that the defendant, in consideration of $3,750, to him paid by the plaintiff, would, one year after the date of said contract, execute and deliver to the plaintiff a perfect deed of the lot described in said contract; and in case of a failure of defendant to execute and deliver such a deed after one year from the date of said contract, he would refund the purchase price, $3,750, with interest at the rate of three per cent a month. This construction of the agreement is not, so far as we are advised, controverted. The date of the contract, as before stated, is June 24, 1887. A deed was not tendered until July 2, 1888, which was more than one year from and after the date of said contract. But the court finds as a conclusion of law "that at the time this action was commenced, February 11, 1889, the defendant was not in default, within the terms of either of said agreements set forth in findings Nos. 10 and 12." That conclusion is probably based upon the following finding of fact: "That on the second day of July, 1888, the defendant made and duly signed and acknowledged before a notary public so as to entitle it to be placed of record a good and sufficient deed of grant, bargain, and sale conveying to the said plaintiff the premises described in said contract between the parties hereinbefore described in finding No. 10, free of all encumbrances; and on the said second day of July, 1888, and before the commencement of this action, the defendant tendered the same to the plaintiff but plaintiff refused to receive or accept the same, and the defendant brought the said deed into court, and renewed his tender and offer therein, and did proffer in his pleadings, and at the trial of this action, to deliver the same to the plaintiff in pursuance of his aforesaid contract to do the same, and the same is now in the custody of the clerk of this court, subject to the order of the plaintiff." There is no finding that a deed was tendered at an earlier date than July 2, 1888. From which we infer that the court regarded the tender of a deed at that time a substantial compliance with the agreement of defendant to execute and deliver to the plaintiff a deed after one year from the date of said agreement, which was June 24, 1887.

Precisely how the court arrived at that conclusion, we cannot intelligently state. But counsel for respondent defends the findings of the court as follows: "But, by the express terms of that agreement, defendant only promised to pay the purchase price of $3,750 back, with interest at three per cent a month, in the event he should fail to deliver a deed after the expiration of a year. He did offer to deliver a deed on the ninth day after the year expired, and prior to the commencement of the plaintiff's action. Such tender of the deed, we submit, was only required to be made within a reasonable time after the year expired." Is that the meaning of the agreement of the defendant to execute and deliver to the plaintiff a perfect deed one year after the date of said agreement, and, in case of failure of defendant to deliver and execute a deed after one year from date of said agreement, he would refund the purchase price, $3,750, with interest at the rate of three per cent per month? We think not. It plainly appears by the language of the contract that the defendant was to deliver to plaintiff a deed one year after the twenty-fourth day of June, 1887, i. e., on the twenty-fourth day of June, 1888, and defendant, failing to do that, bound himself to pay to plaintiff the sum specified in the agreement. It was agreed that time was of the essence of the contract. Nothing is better settled than that parties have a right to make their contracts as stringent as they please, and to make time of the very essence of their contract; and if one party, without the consent of the other, allows the specified time to pass, no matter from what cause, without performing the conditions, the stipulated consequences must follow: Chrisman v. Miller, 21 Ill. 227. We think the parties here, in employing the term "one year after the date of the contract," intended to employ it in the sense in which it is frequently employed in promissory notes, made payable at a specified time after date, as one month after date, the meaning of which is generally well understood. The object of all rules of construction is to arrive at the meaning of the parties, and not to impose one upon them.

Counsel have discussed at some length the question whether this is an action for money had and received, or for rescission of a contract. In our opinion it is neither. It

is an action for the recovery of money upon an express contract. Not to rescind a contract, but to enforce it. Judgment and order reversed.

We concur: Works, J.; McFarland, J.; Paterson, J.; Fox, J.; Thornton, J.

ELLIS v. WOODBURN.*

No. 13,533; October 2, 1890.

24 Pac. 893.

Attorneys—Contingent Fees—Evidence.—In an action for the recovery of attorney fees, the first count of the complaint was on a quantum meruit. The second count alleged that defendant promised to pay plaintiff an absolute fee of $500 for conducting certain litigation, and $1,000 in addition upon the contingency that plaintiff conducted said litigation successfully. The answer admitted that defendant promised to pay the absolute fee, but denied that he promised to pay any contingent fee. Held, that expert testimony was inadmissible to prove what would be a reasonable contingent fee, as the reasonableness of said fee was not in issue. The right to recover such fee depended entirely upon the proof of the alleged promise to pay it, and the performance by plaintiff of his part of the contract.

Attorneys — Contingent Fees — Instructions.— The court instructed the jury that it was admitted that plaintiff did render some service, and "if you do not find that there was an express contract, as stated by either plaintiff or defendant, the services being admitted, and it being admitted that plaintiff has been paid $500 for his services, if you are satisfied that plaintiff's services were worth more than the $500 you will render a verdict for plaintiff for any amount above $500 that you find such services to be worth, not exceeding the sum of $1,000." Held, that the testimony having been as to what would have been a reasonable contingent fee under all the circumstances, and as to what would be a reasonable attorney's fee, in the case, taking into consideration not only the services actually rendered, but others which the plaintiff agreed to render, and there being no evidence as to what the services actually rendered were worth, it was error to give the instruction.

Beatty, C. J., dissenting.

*For subsequent opinion in bank, see 89 Cal. 129, 26 Pac. 963.

APPEAL from Superior Court, El Dorado County; George E. Williams, Judge.

Blanchard & Swisler for appellant; Roger Johnson, Geo. H. Ingham, A. C. Ellis and B. Morgan for respondent.

VANCLIEF, C.—The plaintiff is an attorney at law, and brought this action to recover a balance of $1,000, alleged to be due him from the defendant for professional services. The case was tried by a jury, and the trial resulted in a verdict and judgment in favor of the plaintiff for $1,000. The defendant appeals from the judgment, and also from an order denying his motion for a new trial. The complaint consists of two counts for services rendered in defense of an action prosecuted by the Lake Valley Railroad Company, a corporation, against this defendant, to condemn a right of way over defendant's land, and in conducting negotiations for a compromise of that action. The first count is for the recovery of quantum meruit for such services, alleging them to have been reasonably worth $1,500, and that only $500 had been paid, and praying judgment for the balance of $1,000. The second count is for the recovery of a contingent fee of $1,000 in addition to the $500 admitted to have been paid upon an alleged express agreement between the plaintiff and defendant, to the effect that plaintiff was to defend the action to condemn defendant's land, and at the same time to assist defendant to compromise that action, by selling to the plaintiff therein the land over which the right of way was sought; and in case the compromise failed, and the defense should be unsuccessful, the plaintiff was to commence proceedings to forfeit the right of the railroad company to operate the proposed road, on the ground of nonuser, if that could be proved. For all these services the defendant was to pay the plaintiff $500 absolutely, and the further sum of $1,000, on the condition of success, either in negotiating a compromise by sale of the land, or in the defense of the action, or in procuring a judgment forfeiting the franchise of the railroad company. As a performance of this condition it is alleged that, by the advice and assistance of the plaintiff, a compromise of the action to condemn

the right of way was effected by a sale of defendant's land to the plaintiff in that action. It is admitted that defendant paid $500 before the commencement of this action, but it is alleged that he has refused to pay the contingent fee of $1,000, or any part thereof. The answer of the defendant admits his express promise to pay $500, for plaintiff's services in defending the action, and in assisting to negotiate a compromise by selling his land, etc., but denies that he agreed to pay $1,000, or any further sum, upon any condition or contingency whatever; and alleges, on the contrary, that plaintiff expressly agreed to accept $500 in full satisfaction for all his services in the defense of that action, and in assisting to negotiate a compromise thereof; and also denies that the agreement extended to services in any contemplated proceeding to forfeit the right of the Lake Valley Railroad Company to operate its road. It appears, and is admitted, that, on the day when the trial of the action to condemn defendant's land was about to be commenced, the case was compromised, through the advice and assistance of the plaintiff in this action, by a sale of the defendant's land to the plaintiff in that action, for a price ($36,500) which the defendant consented to take, and which was then paid. As to the existence and terms of the express agreement alleged in the second count of the complaint, the plaintiff and defendant were the only witnesses. The plaintiff testified positively to such a contract in all its details; and the defendant testified as positively to the express agreement alleged in his answer, and that there was no agreement or promise to pay any conditional or contingent fee in addition to the absolute fee of $500. It thus appears that each pleaded and testified to a special express agreement covering the whole subject matter of the services to be rendered, and the fees or compensation to be paid therefor; but as to the existence of that part of the agreement, as alleged in the complaint, providing for a contingent fee or any compensation in addition to the absolute fee of $500, their testimony was squarely and irreconcilably conflicting. If the testimony of either is wholly true, there could have been no implied contract as to the compensation to be paid for any part of the services rendered, and consequently no recovery upon the first count of the complaint, since, to justify

a verdict for the plaintiff on the first count, the jury must have found (1) that there was no valid express agreement as to what compensation should be paid for the services, or for some part thereof; and (2) that the value of the services actually rendered exceeded the sum of $500, which had been paid. On the trial of this case, M. P. Bennett, W. S. Wood, and Patrick Reddy were examined as expert witnesses for the plaintiff to prove what would be a reasonable contingent attorney's fee to be paid by defendant to plaintiff, in the action to condemn defendant's land, upon hypothetical statements of facts, embracing all the facts stated in the second count of the complaint, and some others, which were entirely irrelevant. Upon these hypothetical statements Mr. Reddy and Mr. Wood were asked what would be a reasonable contingent fee. To these questions, the attorneys for the defendant objected, on several grounds, among them, that the questions were irrelevant to any issue made by the pleadings. The court overruled the objections, and the witnesses answered, in substance, that, in addition to the absolute fee of $500, a contingent fee of $1,000 to $1,500 would have been a reasonable contingent fee.

1. The appellant's counsel insist that the court erred in overruling their objection to these questions. I think the objection should have been sustained, for, while there was an issue as to the value of the actual services alleged in the quantum meruit count, there was no issue as to the value or reasonableness of the conditional or contingent fee which is the subject of the second count. An obligation to pay a contingent fee is necessarily the creature of an express agreement, and is not implicated in the mere rendition of valuable services by request, as is the unconditional obligation to pay the reasonable value of such services. Nor does the amount of a contingent fee depend upon, or necessarily coincide with, the value of the services for which it is to be paid; nor in the absence of fraud upon its reasonableness. Whether or not the plaintiff was entitled to recover a contingent fee of $1,000 depended entirely upon proof of the express contract alleged in the second count, and performance of the express conditions of that contract, on his part. That the evidence objected to may have confused the jury to the prejudice of the defendant seems probable from the

fact that there was no evidence of the value of the distinct services actually rendered, considered in connection with the fourteenth instruction to the jury.

2. Counsel for appellant further contend that the court erred in giving to the jury the instruction numbered 14, of which the following is a copy: "It is admitted that plaintiff did render some service, and if you do not find that there was an express contract, as stated by either plaintiff or defendant, the services being admitted, also it is admitted that plaintiff has been paid $500 for his services. If you are satisfied that plaintiff's services were worth more than the $500, you will render a verdict for plaintiff for any amount above $500 that you find such services to be worth, not exceeding the sum of $1,000." I think this instruction erroneous for the reason that there was no evidence tending to prove that the services actually rendered "were worth more than $500," or any sum whatever. The testimony of Messrs. Wood and Reddy was expressly applicable to a contingent fee alone, in answer to the question, What would have been a reasonable contingent fee under the circumstances stated? And the circumstances stated in this hypothetical question included, not only the conditions upon which it was alleged, in the second count, that the contingent fee was to be paid, but others not alleged in either count. Messrs. Wood and Reddy expressed no opinion as to the distinct value of the services actually rendered. Mr. Bennett expressed the opinion that "$2,000 would be a reasonable attorney's fee in the case"; but this opinion is not based solely upon the services actually rendered, but partly upon the consideration of plaintiff's "agreement to follow the case throughout, into whatever court it might be taken, and his agreement to prosecute quo warranto proceedings for a forfeiture of the charter of the Lake Valley Railroad Company in case of a defeat in the condemnation case." Yet it appears that no services were rendered under these parts of the agreement. Mr. Bennett's opinion was evidently intended to be applicable to the second count alone; but, whether so intended or not, it is not applicable to the first count. Upon what evidence, under the fourteenth instruction, was the jury to become "satisfied that plaintiff's services [actually rendered] were worth more than $500,"

if not upon the irrelevant testimony of Messrs. Wood, Reddy and Bennett? The case seems to have gone to the jury in a tangled state; and, to say the least, it does not appear that the jury may not have been confused and misled to the prejudice of the defendant by the erroneous instruction given, and the irrelevant evidence admitted. I therefore think the judgment and order should be reversed and a new trial granted.

We concur: Gibson, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial granted.

I dissent: Beatty, C. J.

NOYES v. SOUTHERN PACIFIC RAILROAD COMPANY.*

No. 13,840; October 8, 1890.

24 Pac. 927.

Railroad—Accidents to Persons on Track.—In an action against a railroad company for the wrongful death of an employee of one of its contractors, it appeared that deceased, with the knowledge and consent of the company, was walking to his work on the right of way, in a narrow place between a bluff and the sea traversed by two parallel tracks, with knowledge that two locomotives, one on each track, would shortly follow him in the same direction; that he received warning by the bell of one, and then perceived that they were approaching at such relative rates of speed as would probably bring them together at the moment of passing him; that he at first took refuge between the tracks where there was barely room to escape unharmed, but a moment later attempted to cross the track toward the bluff, where there was ample room, and was struck and killed while so doing. Held, he was guilty of contributory negligence, and a nonsuit was properly directed.

APPEAL from Superior Court, Contra Costa County.

*For subsequent opinion in bank, see 92 Cal. 285, 28 Pac. 288.

Henry C. McPike and D. M. Delmas for appellant; L. D. McKissick and Fred B. Lake (Harvey S. Brown of counsel) for respondent.

WORKS, J.—This is an action by the appellant, as administrator, against the respondent for damages for injuries resulting in the death of Manuel F. De Mattos. The evidence on the part of the plaintiff being in, the defendant moved for a nonsuit, which was granted. The only question on this appeal is as to the correctness of this ruling. The facts disclosed by the pleadings and evidence are substantially as follows: The defendant owned and operated a railroad. At a point on its road, between Port Costa, and what was known as the "Nevada Docks," there was a double line of tracks. The road at this point ran along the straits of Carquinez, and the width of the roadway was about twenty-four feet; on one side of the two tracks, and about four feet from the end of the ties, was a steep bluff rising from the roadbed, and on the other side the ends of the ties projected to the water's edge. There was a space of eight feet between the rails of the two tracks in the center. One Edgar De Pue had been for more than two years engaged by the defendant as a contractor to load and unload its cars at the Nevada docks. In doing this work he kept in his employ a large number of men, many of whom resided at Port Costa. The roadbed of the defendant furnished the only convenient way for foot-passengers between these two points, and the men who lived at Port Costa had for a long time been accustomed to and did pass along this roadway daily, in going to and coming from their work. To facilitate the operation of loading and unloading the cars, the defendant had been in the habit of sending, daily, two locomotive engines from Port Costa to the docks. On their way to the docks, the locomotives frequently carried some of the workmen, and others would walk along the roadway of the defendant. On the morning of the accident, resulting in the death of De Mattos, a crew of men, under De Pue, started for Port Costa for their work at the docks. They were accompanied, as usual, by two locomotives. Some of the men took the locomotives, but about twenty others, including De Mattos, started on ahead of the engines on foot. They had gone but a short distance when they were followed by one of the

engines, on the switch-track, running at a slow rate of speed. They were overtaken while traveling the narrow part of the roadway above mentioned. They were warned of the coming of the first engine by the sound of its bell, and then beheld the second engine coming at a much greater rate of speed about forty yards distant. It was reasonable to suppose that at the rate the two engines were coming they would be abreast of each other at about the point where the men were, and both of the tracks, and much of the space of the roadway, be thus taken up. The men were called upon to save themselves by some means without delay. Most of them succeeded in reaching the space between the track on the land side and the bluff, and were saved. One of their number jumped into the water on the other side, and escaped with but slight injuries; two others chose to occupy the space in the center between the tracks, and one of them was struck by one of the engines but not injured. De Mattos was in this space between the tracks, and, if he had remained there, would have escaped, but when the second engine was nearing him he made the hazardous attempt to cross in front of it, evidently with the intent to reach the space near the bluff, and in the attempt was struck by the engine, run over, and killed. As the second engine was coming, the track upon which it was moving was clear until the deceased stepped upon it, and then it was too late to stop the engine in time to save him. It is contended by the appellant that, the roadway having been used for so long a time by foot-passengers, it must be presumed that it was so used with the consent and acquiescence of the railroad company, and that therefore the deceased was not a trespasser, or wrongfully upon the respondent's roadway, and not guilty of contributory negligence, and that, for the same reason, the employees of the company were guilty of negligence in not sounding the bell of the engine, and in running at too high a rate of speed. It may be conceded for the purposes of this case that the continued use of the roadway of the respondent as a footway was sufficient to establish the fact that it was being so used with the consent and acquiescence of the company, and that therefore the deceased was not a trespasser. There are authorities holding such a doctrine: Delaney v. Railroad Co., 33 Wis. 67, 70; Troy v. Railroad Co., 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77; Davis v. Railroad

Co., 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406. But, if this be conceded, it does not follow that the deceased was not guilty of negligence. The evidence shows conclusively that he started out on the roadway knowing that the two locomotives would follow immediately. It was also known by the employees in charge of the engines that the workmen were in front of them. The first engine warned the men of their coming. As the second engine came on, the track upon which it was moving was clear, and the men had notice of its coming. The engine was not running at an unusually high rate of speed—some of the witnesses say not more than ten miles an hour. Conceding that the deceased was rightfully on the roadway, it was not necessary that he should have been on the track upon which the locomotive was coming, and as he had knowledge that the engine was following, and must necessarily overtake him on the way, it was negligence for him to travel on the track, or to attempt to cross the track in front of the moving engine. There was evidence sufficient to show that there was ample room for him to have traveled along the roadway, either between one of the tracks and the bluff or between the two tracks, and that, if he had done so, he would not have been injured. It is true, as counsel for appellant contend, that when the danger was upon him, and he was called upon to act instantly, and without time to reflect and choose the safest means of escape, it was not negligence on his part that he made a mistake in attempting to cross in front of the engine: 1 Shear. & R. Neg., sec. 89; Karr v. Parks, 40 Cal. 188, 193; Lawrence v. Green, 70 Cal. 417, 421, 59 Am. Rep. 428, 11 Pac. 750; Smith v. Railway Co., 30 Minn. 169, 14 N. W. 797; Wilson v. Railroad Co., 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. 333. But this doctrine only applies where the party injured is placed in imminent peril without his fault. Such was not the case here. The deceased, knowing that the engines were following him, if he had acted the part of a prudent man, would not at the time of their coming, have been in a position where he would have to run risks in attempting to escape. He could have been in a place on the roadway where no choice, in the face of imminent danger, would have been necessary. His negligence consisted, not in mistaking the safest means of escape from danger, but in placing himself, beforehand, where a choice of different means of escape be-

came necessary. It seems to us, also, that the very same facts which show that the deceased was negligent show also that the employees of the respondent were not guilty of negligence. They knew that the men who had preceded them had knowledge of their coming, and had a right to suppose that they would not be on either of the tracks when there was room for them to pass along safely at the side of the track. Besides, the evidence shows that, up to the instant the deceased was struck by the engine, the track upon which the engine was moving was clear, and there was no apparent reason for stopping or slowing up. The men in charge of the locomotive could not be expected to anticipate the fact that the deceased, who was then in a place of safety between the tracks, would place himself in danger by stepping in front of the engine. We think the nonsuit was properly granted. Judgment affirmed.

We concur: Fox, J.; Paterson, J.

TAYLOR v. FORD.*

No. 12,982; October 18, 1890.

24 Pac. 942.

Jury—Right to Jury Trial.—Plaintiff Brought an Action under Code of Civil Procedure, section 1050, alleging that defendant was making a claim against him for money upon a pretended promissory note; that the exact nature of the claim was unknown to plaintiff; and praying that defendant be compelled to set forth the nature and extent thereof, in order that the court might determine it to be invalid. Defendant answered in the form of an ordinary complaint on a promissory note, and to this plaintiff filed a reply, alleging fraud in procuring the note, mistake, and want of consideration. Held, the action being purely statutory and equitable in form, the reply to plaintiff's answer was unnecessary to the relief sought, and he was not entitled to a jury trial upon the issue thereby raised.

APPEAL from Superior Court, City and County of San Francisco.

*For subsequent opinion in bank, see 92 Cal. 419, 28 Pac. 441.

Code of Civil Procedure, section 1050, provides: "An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former, for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other for which plaintiff is bound as a surety."

Chas. F. Hanlon for appellant; Page & Eells for respondent.

WORKS, J.—This action was brought by the appellant under section 1050 of the Code of Civil Procedure, alleging in his complaint, in substance, that the respondent was making an adverse claim for money against him, on a pretended obligation, to wit, a promissory note; that the exact nature of the claim was unknown to the plaintiff; that no suit had been brought on said claim; that he desired that said claim be brought forward and determined; and praying that the defendant "be compelled to set forth the nature and extent of said claim, and the particulars thereof, in a concise form, and that any cause of action that he pretends to have be fully alleged against this plaintiff, and that thereupon the same be determined by this court to be of no force and validity, and that the plaintiff have judgment against the defendant; that the defendant take nothing under said claim; and that the plaintiff recover costs." The defendant answered by alleging that the plaintiff was indebted to him in the sum of $2.660.44, on a promissory note, a copy of which note is set out in the answer. This answer is, in legal effect, the same as an ordinary complaint on a promissory note, and prays for judgment in like manner. The only allegations therein, not properly belonging to a complaint on a promissory note, are that the note set out is the obligation mentioned in plaintiff's complaint, and a denial of the allegation in the complaint that the plaintiff did not know the exact nature of the defendant's claim. The plaintiff treated the defendant's answer as a cross-complaint, so far as it set up and relied upon the note, and filed an answer thereto, alleging fraud in procuring the note, mistake and want of consideration. On the issues thus formed the case went to trial. The court below found for the

defendant, and rendered judgment in his favor on the note. The plaintiff moved for a new trial, which was denied, and he appeals. The plaintiff demanded a jury trial as to what he claims were the legal issues formed by the answer or cross-complaint, and his answer of fraud, mistake and want of consideration. This was denied, and he complains that this was error. The respondent contends that there were no legal issues in the case; that the action was brought by the plaintiff; that it was statutory and equitable in its nature; that the issue presented was made by the complaint, and the answer of the defendant; and that the pleading on the part of the plaintiff by way of answer was unnecessary and superfluous. The question is not entirely free from doubt, but we think that the court below was right in denying the plaintiff a jury trial. The real issue presented by the pleadings was whether the defendant's claim was a pretended one, as alleged by the plaintiff, or a valid one, as averred by the defendant. If an invalid and pretended one, asserted against the plaintiff, he was entitled to judgment so declaring it. If a valid one, as claimed by the defendant, he was entitled to a judgment to that effect, and that it be enforced as such. The plaintiff, instead of waiting and allowing the defendant to bring his action on the note, saw fit to bring a purely statutory action, equitable in form, to have the claim declared invalid and set aside, and prayed in his complaint for such relief. The sole object of his complaint was to have the claim presented that he might have it so declared and set aside. It was only necessary for the defendant to set up his claim. This presented the whole issue. No pleading was necessary on the part of the plaintiff in reference to the defendant's answer. It was not a cross-complaint, nor was it pleaded as such. Under the allegations of his complaint the plaintiff might have proved every fact necessary to show the invalidity of the defendant's claim without further pleading. This was the gist of his complaint, and the very foundation of his right to maintain the action. The fact that legal issues, incidental to the main issue, which is equitable, must be determined in arriving at a decision of the case, does not entitle either party to a jury trial: Downing v. Le Du, 82 Cal. 472, 23 Pac. 202. In this case the cause of action being to declare an obligation invalid, and to set it aside, the real issue in the case was equi-

table, and the plaintiff, having chosen this equitable remedy, and thus brought the defendant into court to meet his equitable cause of action, cannot complain that a jury trial, which would have been his right, if he had allowed the defendant to maintain his common-law action on the note, was denied him. It is contended that the findings of the court below were not sustained by the evidence, and that they do not sustain the judgment. There was evidence to support each of the findings, and the weight of the evidence must be left to the determination of the trial court. The findings are sufficient to uphold the judgment. Judgment and order affirmed.

We concur: Fox, J.; Paterson, J.

WILLAMETTE STEAM MILL & LUMBER CO. v. KREMER et al.*

No. 13,690; October 22, 1890.

24 Pac. 1026.

Mechanic's Lien—Notice—Sufficiency of Description.—Where a mechanic's lien notice describes the property as a dwelling-house, situate upon a certain lot, and it turns out to be situated partly on that lot and partly on another, the lien cannot be enforced, as there is no lien on that part of the house not situated on the lot named, and it would work great injury to the owner to allow the lien to be enforced against a part only of the house.

APPEAL from Superior Court, Los Angeles County; W. P. Wade, Judge.

Wells, Guthrie & Lee for appellants; Johnston & Borden and Barclay, Wilson & Carpenter for respondents.

WORKS, J.—This is an action to foreclose mechanics' liens. There were three claimants, and their actions were consolidated together. The notice of two of the liens described the

*For subsequent opinion in bank, see 94 Cal. 205, 29 Pac. 633.

property as situate on lot 6 of a certain addition to the city of Los Angeles. The other described the property as "that certain dwelling-house now upon that certain lot or parcel of land situate in the city and county of Los Angeles, state of California, at the northeast corner of Eighth and Hope streets." This notice did not give the description of the lot by number or reference to the addition or map of it, but it described the corner lot, and, as the property was subdivided into lots and blocks, this description must, if sufficient at all—which we very much doubt—be held to mean the corner lot as thus subdivided, and no more; so that all of these descriptions, conceding this one to be sufficient, are in legal effect the same. At the trial the court found that the house was situated partly upon lot 6, which was the corner lot, and partly upon the adjoining lot, 7. Upon this finding the court rendered a decree foreclosing the lien on lot 6 only, which took all of the house but about ten feet.

It seems to be too clear for argument that a lien cannot be enforced against a part of a house. Counsel for respondents say that the appellants are not injured by their taking only a part of the property that might have been included in their lien. Ordinarily, no doubt, this would be so, but it is not so in this case. To attempt to sell a part of the appellants' house would necessarily be to sacrifice the property. No one would pay a reasonable price for a part of a house, and the ten feet, or less, remaining to the appellants would be almost, if not entirely, worthless. Such a sale would therefore work great injury, and cannot be allowed. For these reasons the liens in this case cannot be upheld. There are other errors assigned by the appellants and urged in their briefs, but as the one mentioned is fatal to the liens the others need not be considered. The judgment and order are reversed.

We concur: Paterson, J.; Fox, J.

BARRY v. GOAD et al.*

No. 12,984; November 6, 1890.

24 Pac. 1023.

Schools—Employment of Teachers.—The Employment, by the Board of education of the city and county of San Francisco, of inspecting teachers, whose duty it is to visit the schools and ascertain, by frequent oral examinations, the condition of the classes, and to give advice to teachers and principals when necessary, is within the power to "employ teachers" conferred on the board by Worley's Consolidation Act, page 171, section 1, subdivision 3 (Stats. 1871–72).

APPEAL from Superior Court, City and County of San Francisco.

Otto Tum Suden and Horace W. Philbrook for appellant; Jos. Rothschild for respondents.

FOOTE, C.—This action was brought by the plaintiff, a resident citizen of California, of the city and county of San Francisco, and a tax-payer, for the purpose of restraining the defendants, the board of education of the city and county of San Francisco, from drawing any drafts upon the school fund of the said city and county in favor of Laura T. Fowler and J. G. Kennedy, as compensation for their services as teachers in the public schools of said city and county. The cause was tried before the court, without a jury, and there is no bill of exceptions or statement on motion for a new trial. Upon the complaint and answer, apparently, the court found—First, that the allegations of the complaint were not sufficient in law to entitle the plaintiff to any relief or judgment; second, that all the affirmative allegations in defendants' answer were true. Judgment passed for the defendants, from which this appeal is taken. The whole matter turns upon the question as to whether the board of education had the power to appoint, and order paid out of the school fund, Fowler and Kennedy, as inspecting teachers, and this depends upon the language of the statute, which is the measure of their power to appoint teachers; and whether the duties as-

*For subsequent opinion in bank, see 89 Cal. 215, 26 Pac. 785.

signed to the teachers above mentioned, under their employment by the board, are those which appertain to teachers such as that board could appoint. The answer sets up, in an affirmative defense, the resolution of the board defining the duties of the teachers, who, it is claimed by appellant, are inspectors merely, and not teachers. He insists that such persons were not employed to perform the functions of teachers in the public schools at all, but were to be mere inspectors of schools, and to perform the duties that pertained to members of the board of education, which could not be delegated to anyone. That being so, such appointments or employments were without authority of law, and the appointees could not be paid from the school fund. The power of employing teachers given to this board is to be found in the Statutes of 1871–72 (see Worley's Consolidation Act, page 171) as follows: Section 1, subd. 3. "To employ and dismiss teachers, janitors and school census marshals, and to fix, alter, allow and order paid their salaries or compensation," etc. The resolution of the board of education, under which Laura T. Fowler was employed as inspecting teacher, paid, and her duties defined, provides, specially, that her duty shall be to visit schools and ascertain by frequent oral examinations the condition of the classes; to observe carefully the methods of teaching and discipline by the teachers; to give advice and assistance to teachers and principals, when necessary; and, in their presence and before their classes, exemplify the best methods of teaching. It is alleged in the answer, and not denied, that J. G. Kennedy was appointed by the board as head inspecting teacher of the public schools of San Francisco. It is plain, we think, that unless the duties to be performed by them are such as are compatible with those of teachers in the public schools, the statutes do not authorize their employment or payment out of the school fund. Whether such appointments of teachers are, or not, in consonance with good policy in connection with the public schools is not a matter which comes within the purview of the appellate court to consider. The only thing left for determination is whether these persons, thus appointed, are teachers in the sense as expressed in the statute above quoted. That statute does not declare what kind of teachers the board is to employ. It says they may "employ and dismiss teachers."

This means, of course, teachers for the public schools, such as the course of study in such schools, as prescribed by law and the regulations of the board, may demand. We cannot see what duty is assigned to these so-called "inspecting teachers," which may be said to make them anything but teachers, instructors or tutors. They seem to be a higher order of teachers than those immediately over the pupils; but they are nevertheless teachers. They examine the school children orally, and thereby ascertain the condition of their classes. They observe the methods of teaching and discipline pursued by the other teachers. They give advice and assistance to other teachers, and, in their presence and before their classes, exemplify the best methods of teaching; and all these matters come within the province of a teacher or instructor, and tend to educate the public school children. We cannot say, therefore, that the board of education exceeded its powers in employing this kind of teachers; and we advise that the judgment be affirmed.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

HERBERGER v. HUSMANN.*

No. 14,012; November 7, 1890.

24 Pac. 1058.

Vendor and Vendee—Disaffirmance by Vendee.—Where a contract for the sale of land provides that the vendee may disaffirm the sale at the end of a year, in which event he is to be repaid his purchase money, with ten per cent interest, on giving thirty days' notice of his intention to disaffirm, the vendor cannot complain that the vendee gave more than thirty days' notice of his intention, as this is to the vendor's advantage.

Vendor and Vendee—Disaffirmance by Vendee.—A further provision in the contract of sale that on its disaffirmance the vendee

*For subsequent opinion in bank, see 90 Cal. 583, 24 Pac. 1058.

should surrender the title acquired by him thereunder is sufficiently complied with by an offer, in the notice of disaffirmance, to surrender his claim to the land on the repayment to him of the purchase money; and, on the vendor's refusal to make such repayment, the vendee may maintain an action therefor without tendering a release of his rights under the contract, Code of Civil Procedure, section 2074, providing that an offer in writing to deliver a written instrument is, if not accepted, equivalent to a tender of the instrument.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

R. L. Horton for appellant; Allen & Miller for respondent.

WORKS, J.—The parties to this action entered into a contract for the sale by the appellant to the respondent of certain real estate, $1,500 of the purchase money to be paid at the time the contract was executed, and $1,000, the balance of the purchase money, at the end of one year, at which time a deed for the property was to be executed. The contract was in the usual form of such agreements, except that it contained this clause: "And it is further agreed by and between the parties hereto that, should the party of the second part become dissatisfied with the purchase of said lots at the end of one year from date hereof, then, and in that event, should the said party of the second part so desire, the said party of the first part hereby agrees to return to said party of the second part the amount of money this day paid on said lots by the party of the second part, with interest thereon at the rate of ten per cent per annum, provided said party of the second part gives said party of the first part thirty days' notice, and a surrender to said party of the first part of the title to said lots; but, should the party of the second part not notify the party of the first part, as agreed, then this agreement to hold good." The contract stipulated that time should be the essence thereof. The contract was executed, and the $1,500 paid on the thirtieth day of November, 1887. On the twelfth day of September, 1888, the respondent served upon the appellant the following written notice: "You are hereby notified that, as per agreement in a certain article of agreement heretofore entered into by and between H. Husmann, the party of the first part, and Theobald Herberger, the party of the second part,

wherein in said agreement said H. Husmann agreed to convey to said Theobald Herberger lots 4, 5, 6, 7, and 8, in block F, of the Park tract, East Los Angeles, one year from date thereof, which said agreement was dated November 30, 1887, and recorded in Book 338, at page 292, of Deeds, Los Angeles County Records; and whereas in said agreement it was agreed by and between the parties thereto that, should the said Theobald Herberger become dissatisfied with the purchase of said lots therein mentioned, the said party of the first part, H. Husmann, therein agreed to refund to said Herberger the amount of money which said Herberger had advanced, with interest thereon at the rate of ten per cent per annum, provided said Herberger gave to said Husmann thirty days' notice: Now, therefore, this is hereby to notify you, the said H. Husmann, that I, Theobald Herberger, am dissatisfied with said purchase, and, as agreed upon in said article of agreement, request and demand that you return to me the amount of money so advanced to you, to wit: Fifteen hundred dollars, with interest thereon at the rate of ten per cent per annum, then, and thereupon, I will surrender to you the title to said lots you by your article of agreement conveyed to me." The appellant failed to repay the $1,500, and the respondent brought this action against him for its recovery. In addition to the facts above stated, it was alleged in the complaint: "That after the expiration of thirty days from the giving of said notice, to wit, at the end of one year from the date of said agreement, plaintiff was dissatisfied with said purchase, and notified defendant of his dissatisfaction with said purchase, and offered to return and release all rights thereunder, and then, and at subsequent times, each more than thirty days thereafter, plaintiff demanded of defendant a return of said $1,500, with interest, as provided in said agreement, and offered, upon receipt thereof, to surrender to defendant all title to said lots, and rights conveyed to plaintiff therein by said agreement, and to release defendant therefrom; but defendant, in violation of said agreement with plaintiff, neglected, and still neglects, to return said $1,500, with interest as aforesaid, to plaintiff, and accept from him the said release." The defendant answered, admitting the execution of the contract and the giving of the notice, but denied the allegations of

the complaint, above set out, and denied that "the plaintiff ever offered or tendered any instrument to the defendant purporting to convey title to said property, or any part thereof, or to release the defendant fom the obligation resting upon him by virtue of said contract of sale, except on the twelfth day of September, 1888." The defendant also filed a counterclaim, the specific performance of the contract, to which the plaintiff answered by alleging the facts set up in his complaint. The court found the facts substantially as alleged in the complaint, and, in addition, that the defendant had consented to a rescission of the contract and promised and agreed to repay the $1,500, and interest. Judgment was rendered for the plaintiff for the amount claimed by him. A new trial was denied, and the defendant appeals.

The appellant contends that the notice of the election of the respondent to rescind the contract, and his demand for the repayment of the amount paid by him, was not effective because it was, as he claims, prematurely given. The point made is that the notice must, by the terms of the contract, have been given at the end of the year, and could not properly be given before that time. We do not so understand the agreement. The appellant was entitled to thirty days' notice of the respondent's election not to complete the purchase, and this notice must necessarily have been given at least thirty days before the expiration of the year, at which time the respondent was entitled to a return of his money. The notice was given more than thirty days before the end of the year, but the appellant certainly has no reason to complain of this fact. It was to his advantage that more time than the agreement required was given him within which to raise the money, if necessary, to meet his obligation to repay the $1,500.

Again, it is contended that the respondent failed to make out his case because it was not shown that he, at any time, tendered a reconveyance of the title to the appellant, or offered to do any act that would relieve the latter from the effect of the contract, upon his title, or to place him in statu quo. No conveyance of the property by the respondent to the appellant was necessary, because the title had never passed to the respondent. There was an agreement

to convey to him, and nothing more. It would probably have been sufficient for him to deliver up his contract, or, if recorded, to give, in addition, a release of his claims under it, but it is unnecessary to determine what act was necessary on his part to put the appellant in statu quo. This case is fairly within section 2074 of the Code of Civil Procedure. Under that section, the offer to surrender up the title to the property was equivalent to an actual tender of an instrument which would have had that effect. If the appellant had any objection to the tender, it was his duty to make it known: Code Civ. Proc., sec. 2076; Ward v. Flood, 48 Cal. 46, 17 Am. Rep. 405; Oakland Bank v. Applegarth, 67 Cal. 86, 7 Pac. 139, 476. No such objection was made. On the contrary, the evidence tends strongly to show, and the court below found, that the appellant consented to the rescission. A demand was made upon him for the money at the end of the year, and afterward, when he stated, according to the testimony of some of the witnesses, that a certain party, referred to by him, had promised to and would raise the money for him. Of course, if the appellant had been in a condition to pay the money, and was willing to do so, he could, as a condition of such payment, have required the respondent to place him in statu quo by such a conveyance or surrender of his rights as were necessary for that purpose. Not having done so, the written offer was sufficient as a basis for this action. It is perfectly evident, from the reading of the evidence, that the only reason that the appellant had for not complying with his contract was that he was unable to raise the funds necessary to meet his obligation. The evidence sustains the findings, and the findings support the judgment. Judgment and order affirmed.

We concur: Fox, J.; Paterson, J.

HYDE v. BOYLE et al.

No. 13,849; November 9, 1890.

24 Pac. 1060.

Appeal—Failure to File Transcript.—A Motion to Dismiss appeal on the ground that the transcript was not filed in time will be denied, where it appears that the question of the settlement of the bill of exceptions in the cause was not determined until the day of the motion.

In bank. Motion to dismiss appeal.

George H. Buck and Edward F. Fitzpatrick for petitioner; T. M. Osment for respondent.

PER CURIAM.—This is a motion to dismiss appeal on the ground that the transcript was not filed in time. It appearing that the question of the settlement of the bill of exceptions in the cause was not determined until this day, the motion is denied.

MANNING v. DEN.*

No. 13,821; November 19, 1890.

24 Pac. 1092.

Special Assessments.—Where Plaintiff, in an Action to Collect a street assessment, has made prima facie proof of the regularity of the proceedings, under act of March 18, 1885 (Stats. 1885, p. 147), and thereafter introduces, without objection, certain parol proof, a refusal to strike this out, if error, is without injury, as such proof was unnecessary.

Trial.—An Objection to an Offer to Prove Certain Negative conclusions is properly sustained where there is no offer of the evidence from which the conclusions are to be drawn.

APPEAL from Superior Court, Los Angeles County.

*For subsequent opinion in bank, see 90 Cal. 610, 27 Pac. 435.

M. Whaling for appellant; Herndon, Cain & Garrison for respondent.

FOX, J.—This is an action to recover an amount claimed to be due upon a street assessment levied under proceedings had in pursuance of the provisions of the act of March 18, 1885 (Stats. 1885, p. 147). Judgment for plaintiff, motion for new trial made and denied, and defendant appeals.

The principal contention is that the evidence is insufficient to show that the proceedings resulting in the assessment and warrant were such as required by law, and sufficient to entitle the plaintiff to recover; in other words, that there was a failure to show a valid contract upon which to base the assessment and warrant. Section 12 of the act which authorizes the suit provides: "The said warrant, assessment, and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment and diagram are based, and like evidence of the right of the plaintiff to recover in the action." With the policy of this provision the court has nothing to do, so it is written and adopted by the legislature. The assessment and diagram attached were offered and admitted in evidence without objection. Plaintiff then offered the warrant and affidavit, with the indorsement of record thereon. To this defendant "made the same objections as those offered to the assessment." As he had offered no objections to the assessment, this objection was correctly overruled. This made out a prima facie case for the plaintiff. But, in addition to this, the plaintiff did introduce, without objection, the records of all the preliminary proceedings on the part of the city council prescribed and required by the statute, with the proof of publication, posting, etc., and in addition thereto made, without objection, parol proof of the fact of contract. This last proof the defendant subsequently moved to strike out, but as it was admitted without objection, and was unnecessary, since the warrant and assessment were prima facie proof of the same fact, the court denied the motion. We do not think that this ruling was erroneous, but, if it was, it was error without injury.

Plaintiff, having also proved his assignment of the claim to himself, rested, when the defendant moved for a nonsuit, on ten different grounds, every one of which is based upon a misconception of the effect of the evidence already in, and hereinabove stated. There was no error in denying the motion. Defendant then "offered to prove" several negative conclusions, not facts, but as he did not offer the evidence from which the conclusions were to be drawn, the court correctly sustained an objection to the offer. He then called the street superintendent (successor in office to the one under whom the contract, assessment and warrant were made), who, at defendant's request, produced two papers, which defendant offered in evidence. These appeared to be a blank form, partially filled out, of contract, and a bond for the same street work for which this assessment was made. The bond was complete, fully executed, approved and certified; but the paper offered as a contract was a mere blank, and there was no attempt to prove that it was the contract, or claimed to be the contract, under which the work was done, or on which the assessment was based. Objection to its introduction was properly sustained. The authorities cited by appellant, in view of the statute, the prima facie case made by plaintiff, and of the fact that defendant made no showing to overcome that prima facie case, though good law, are not in point. Judgment and order affirmed.

We concur: Paterson, J.; Works, J.

BLUMENTHALL v. GOODALL.*

No. 12,638; December 6, 1890.

25 Pac. 131.

Broker—Revocation of Authority.—A Person Authorized by the Owner of land to sell it gave a contract to a third person for the price named, but "subject to perfect record title. Thirty days allowed for examination of title." The owner of the land let such third person take the abstract to examine, but told him he could

*For subsequent opinion in bank, see 89 Cal. 251, 26 Pac. 906.

not have thirty days. Held, that as the agent had not produced a purchaser ready and willing to take the property on the terms embraced in the authority, the owner might, before such unconditional acceptance, revoke the authority of the agent.

APPEAL from Superior Court, City and County of San Francisco.

H. C. Firebaugh for appellant; Geo. E. Towle for respondent.

FOX, J.—Action for the recovery of commissions claimed to have been earned by a real estate agent, in the sale of certain lands belonging to defendant. Judgment for defendant; motion for new trial denied, and appeal from both judgment and order. The record contains no bill of exceptions, or statement of the case. Consequently, there is nothing upon which we can review the order of the court refusing to grant a new trial. The only examination we can make is of the judgment-roll, and the only inquiry is whether the findings support the judgment. The court found that the defendant, being the owner of the land in question, on the thirteenth day of July, 1887, gave to L. Oestreicher, a real estate agent, an authorization in writing, of which the following is a copy: "I hereby authorize Mr. L. Oestreicher to sell blocks 899, 900, 901, 903, outside lands, for the sum of fifteen hundred dollars ($1,500) each; will allow him one hundred dollars ($100) as commissions for his services on each block. This contract to be in force for ten days from date hereof." Which paper was duly dated and signed by defendant. The court further finds that on the same day, Oestreicher agreed with one Fulda, orally, for the sale of the blocks at the price named, but, Fulda failing to put his agreement in writing, Oestreicher afterward, and on the same day, executed with O. F. Von Rhein & Co. the following agreement in writing: "Received of O. F. Von Rhein & Co. the sum of three hundred dollars ($300) on account of purchase of outside land, blocks 899, 900, 901, and 903; price agreed upon, six thousand dollars, ($6,000); subject to perfect record title. Thirty days allowed for examination of title. If title does not prove perfect, deposit to be returned." On the same day Oestreicher notified the de-

fendant in writing of what he had done with Von Rhein; that on the 14th, Von Rhein applied to defendant, told him of his agreement to purchase, and asked for the abstract of title. Defendant told him that he would not allow thirty days to examine title. Von Rhein replied that he would make the examination earlier if possible, and received and receipted for the abstract, the same to be returned to the defendant, but no time for its return specified. Later in the same day defendant received from Fulda a letter, notifying him that he (Fulda) had agreed with Oestreicher for the purchase of the blocks, and that he was prepared to examine the title, and complete the purchase if the title proved satisfactory, demanding of defendant to complete the sale, and offering to deposit $500 on account thereof; that on the next day defendant served written notice upon both Oestreicher and Von Rhein & Co., reciting that Oestreicher had procured the authorization given to him upon his representation that he had an eastern party who was about to depart, to whom he could sell those blocks, if he had authority to act at once, but he had not time to hunt up other blocks for him before his departure; that, instead of selling them as he said he could, he had negotiated a sale of them to two different resident purchasers, and, in view of these complications and misstatements, he revoked the authority of Oestreicher, and declined to proceed further in the consummation of the sale of the property through him; that on the nineteenth day of July, Von Rhein completed his examination of the title, and offered to complete the purchase, but the defendant refused to accept the money, or make the deed; that demand of the commission had been made and refused, and the claim therefor had been duly assigned to plaintiff. It was also found that the authorization from defendant had not been secured through any fraud or misrepresentation on the part of Oestreicher. On these facts the court found, as conclusion of law, that the plaintiff was not entitled to the relief demanded, and judgment was entered for defendant.

Although the rule may in some cases be a harsh one, the conclusion of the court was correct. Goodall had the right to revoke the authority given to Oestreicher at any time before complete performance on his part: Civ. Code, sec. 2356; Masten v. Griffing, 33 Cal. 114; Brown v. Pforr, 38 Cal. 553; Janin v. Browne, 59 Cal. 47; Flanagan v. Brown, 70 Cal. 254,

11 Pac. 706. Up to the time of the revocation in this case, there had been no performance on the part of Oestreicher. Performance on his part, to entitle him to his commissions, would have been the production of a purchaser, then ready and willing to make the purchase upon the terms embraced in the authority. No such purchaser had been found and produced when the authority was revoked. Neither of those who are claimed to have been such had up to that time signified their willingness to take the property unconditionally, upon the terms proposed. Judgment and order affirmed.

We concur: Sharpstein, J.; McFarland, J.; Paterson, J.

We dissent: Works, J.; Thornton, J.

OHM v. CITY AND COUNTY OF SAN FRANCISCO et al.*

No. 13,689; December 9, 1890.

25 Pac. 155.

Mexican Grants—Validity—Possession.—A Mexican grant of eight hundred varas square, "at a place called Rincon, embraced within the limitation of Yerba Buena," is so vague and uncertain that nothing passes by force of the grant alone, nor will it be helped out by possession taken under it by the grantee, as the Mexican law, then in force, required possession to be given "by judicial authority, with the citation of all those bounded upon him."

Mexican Grants—Validity—Record.—Such grant is also fatally defective, where the original application, to which is attached each successive paper or certificate up to and including the final grant, fails to show on its face that the grant was made with the approval of the pueblo, of the governor, and of the departmental assembly, and that a record of such fact was made in the public archives, as required by the laws of Mexico then in force.

Evidence—Judicial Notice.—Under Code of Civil Procedure, section 1875, subdivision 3, which permits courts to take judicial notice of the acts of the judicial department of the state, the supreme court will judicially notice the vacation of a decree confirming a Mexican grant.

*For subsequent opinion in bank, see 92 Cal. 437, 28 Pac. 580.

Mexican Grants—Action for Possession.—One Who Alleges that he has a perfect title to land under a Mexican grant, not barred by the statute of limitations, may maintain a legal action for the possession, and there is no necessity for the interference of a court of equity to enable him to assert his rights.

Mexican Grants—Limitation of Actions.—Since the Passage of Statutes of 1863, page 327, which gives five years "from the date of its passage" in which one claiming title to land under a Spanish or Mexican grant may commence an action for its enforcement, the want of confirmation, patent, or survey of such a grant by the United States government has not operated to interrupt the running of the statute.

Pleading.—Where a Pleader, in His Complaint, alleges a fact, and then sets out the written evidence on which he relies for proof of the fact, the complaint will be held good for only what the evidence proves.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

A. Everett Ball and J. M. Kinney for appellant; Pillsbury & Blanding and Geo. Flournoy, Jr., city attorney, for respondents.

FOX, J.—This is an action in equity for a decree declaring the appellant to be the owner of certain premises situate in the city and county of San Francisco, commonly called, in early times, the "Sherrebeck Claim," and adjudging that the defendants hold the legal title in trust for plaintiff; and also for rents and profits up to the time of the filing of the complaint, in the sum of $1,500,000, and at the rate of $250,000 per month from that date (August 1, 1885) to the date of judgment. Defendants demurred to the complaint on several grounds, and, among others, that it failed to state facts sufficient to constitute a cause of action; that plaintiff's claim was stale; also that it was barred by the provisions of sections 318, 319, 322 and 343 of the Code of Civil Procedure. The demurrer was sustained, and defendants had judgment, from which plaintiff appeals.

In his complaint, plaintiff claims as successor in interest of Peter T. Sherrebeck, the alleged grantee of a Mexican grant of a tract of land eight hundred varas square, within the pueblo of San Francisco. He does not content himself

with alleging the ultimate fact of grant and title, but sets out with great particularity all the proceedings had in applying for, and in the making and delivery of, the alleged grant. He shows that a pueblo was already established; that the land was within the pueblo; that the applicant applied to the prefect of the district for a grant; that the prefect, as the law required he should do, referred the application to the alcalde of the pueblo, who reported the land vacant, and the applicant as possessing the requisite qualifications; but that, in his opinion, only land upon which to build a house and corral, and to plant, can be granted to him, which means that only a house lot of fifty varas square, and a planting lot of two hundred varas square, could be granted to him. Whereupon the prefect, according to the allegations of the complaint, made a grant to the applicant of eight hundred varas square, "at a place called 'Rincon,' embraced within the limitation of Yerba Buena," which grant is set out in the complaint, and from which the quotation just made is copied. It contained no description or boundaries whatever other than that so quoted. It did not require that juridical possession be given, and the complaint does not show that any ever was given. It, however, alleges that under it the grantee took possession of eight hundred varas square, claimed to be the property now sought to be recovered. The complaint fails to show a valid grant. The description given in the paper grant was so vague and uncertain that nothing would pass by force of this paper alone, nor would it be helped out by possession taken under it by the grantee. Under the law, juridical possession by the public authorities was required to be given. "No person," reads the law, "though his grant be older than others, can take possession for himself, or set limits to his landed property, unless it be done by judicial authority, with the citation of all those bounded upon him (colindantes), for whatever is done contrary to this will be null and of no validity or effect." "As the grantee could not locate his land by his own survey, it would seem a necessary conclusion that he could not do so by mere occupation, and the assertion of a claim to any particular place": Waterman v. Smith, 13 Cal. 411. This survey or juridical possession made or given was requisite, in order to attach

the grant, if it was one having any force whatever, to any specific tract of land, and must have been made by competent authority: Steinbach v. Moore, 30 Cal. 508, affirmed in More v. Steinbach, 127 U. S. 79, 32 L. Ed. 51, 8 Sup. Ct. Rep. 1067; Leese v. Clark, 18 Cal. 536.

This grant was also fatally defective in other particulars. It is a matter of common knowledge, as well as of law, that the initial paper, in all these cases of Mexican grants, was the petition, or application for a grant. Each successive paper or certificate, to and including the final grant, and the certificate of juridical possession, was indorsed upon or attached to this petition, so that when the last step was taken which perfected the title, the grantee had in his possession all the original papers in the case constituting one instrument, records of the different parts thereof having been made in the public archives as the proceedings progressed, and this instrument constituted his muniment of title. In this case the plaintiff has alleged that the grant was made with the approval of the pueblo, the governor of the territory, and of the republic of Mexico. The law required that it should be so made, and that a record of the fact should be made in the public archives. The plaintiff has made his paper title a part of his complaint, by setting it out in haec verba. By so doing, he has proved that the averments of his complaint above referred to are not true. The grant was not made with the approval of the pueblo, but against the objection of the chief executive officer, who spoke for the pueblo, as shown upon the face of the paper pleaded. The paper fails to show that it was with the approval of the governor of the territory, or of the republic of Mexico. Without such approval, attested by the signature of the governor, and the order of the departmental assembly, it was without authority of law. Such was the rule, even where the lands were not municipal: Luco v. United States, 23 How. (U. S.) 515, 543, 16 L. Ed. 545. Being municipal lands, the fact of the grant must be registered in the public archives of the municipality: S. F. Land Titles, p. 144, art. 17; Dwinelle's Colonial History of San Francisco, addenda, p. 11; Plan of Pictic, sec. 17; Donner v. Palmer, 31 Cal. 508. The paper fails to show registration anywhere, either in the archives of the nation, the department, or the municipality.

The complaint alleges that it was recorded by the prefect in the archives and registers of his prefecture; but the paper fails to show even such recording, and there was no law making the archives of the prefect, if he kept any, public archives for the registration of land titles. It may be said that since there is an allegation of the recording, whether it was recorded or not becomes a matter of proof, and cannot be questioned on demurrer. The answer to this is that the fact is one which ought to appear upon the paper itself according to the laws and usages of the country; that these laws, usages, and customs of the country are matters of which the court will take judicial notice, as well as of the principal fact that they are not so recorded: Fremont v. United States, 17 How. (U. S.) 567, 15 L. Ed. 241; Romero v. United States, 1 Wall. (U. S.) 721, 17 L. Ed. 627. The complaint is to be taken most strongly against the pleader. When he alleges a fact, and then sets out the written evidence upon which he relies for proof of the fact, the complaint will be held good for only what the evidence proves.

There are other points of objection taken to the validity of this grant, but they do not need to be considered here. To obviate these defects the complaint alleges decree of confirmation of this grant, on the fifth day of December, 1859, and sets out the decree. This decree is equally indefinite with the grant in the matter of description, and on its face requires a survey and location. More than twenty-five years had passed after this alleged decree before the filing of this complaint, and there is no allegation of survey whatever. But more than this, the pleading of this decree was unwarranted in law, and almost without precedent in the history of jurisprudence. The decree itself was vacated and set aside within six months afterward, and there is no decree of confirmation of the grant. This fact does not appear upon the face of the complaint, but it is a matter of common history and knowledge of the country, and is an act of the judicial department of the government of the United States, of which this court will take judicial notice, under subdivision 3, section 1875, Code of Civil Procedure: Sharon v. Sharon, 79 Cal. 697, 22 Pac. 26, 131; Romero v. United States, 1 Wall. (U. S.) 742, 17 L. Ed. 627.

Plaintiff's cause of action, if any he ever had, is both stale and barred by the statute of limitations. There is no pretense in the complaint that the plaintiff or his grantor have been in possession of this property since the date of the treaty of peace, in 1848—forty-two years since. It is alleged that the pueblo became a municipal corporation, by the name of the "City of San Francisco" (the predecessor of the present municipal defendant), in April, 1850; that it applied for confirmation of its title to four square leagues, including said eight hundred varas square, in 1852; that, pending the proceedings thereunder, it disputed the title of said Sherrebeck, and the location of the same. According to the rules of construction of pleadings, it must be held that this is an admission that the title was disputed by the defendant as early as the institution of such proceedings—July 1, 1852. Plaintiff's grantor had been then at least four years out of possession. If, as plaintiff claims, he had a perfect title under the Mexican government, or under the pueblo, his cause of action then at once arose, and he could at once, and if his title be, as claimed, a perfect one, and not barred, he can still maintain his action at law, for the recovery of the possession of said property. That such an action could be maintained upon such a title as he claims this to be was held by this court as early as Reynolds v. West, 1 Cal. 323; affirmed in Cohas v. Raisin, 3 Cal. 443; Hart v. Burnett, 15 Cal. 616; Payne v. Treadwell, 16 Cal. 231; and has never been overruled. According to his own theory of the case, there has therefore never been a necessity for a resort to a court of equity to assert his right. He had ample remedy at law, and a court of equity will not interfere.

But he has slept so long upon his rights, if he ever had any, that he cannot now recover at law, and the same rule that forbids his recovery at law forbids it in equity. His right of action accrued, and the statute of limitations commenced to run against him, at the latest, July 1, 1852. Before the expiration of five years, however, the statute of limitations was amended, so that the action could be maintained if commenced within five years from the time of final confirmation of the title by the government of the United States, or its legally constituted authorities, if the title was

one derived from the Spanish or Mexican government: Stats. 1855, p. 109. In 1863, the statute was again amended, giving five years from the date of the passage of that act in which to commence the action, where title was claimed under the Spanish or Mexican government, unless five years had already run since the date of confirmation: Stats. 1863, p. 327. Since the passage of that act, there has been no disability on account of want of confirmation, patent, or survey, against the running of the statute of limitations. A careful reading of that act can leave no doubt that the statute of limitations commenced to run in favor of the city and county of San Francisco, and its grantees, for the lands embraced in the grant to the pueblo of which it or they were in possession at the date of that act (April 18, 1863), no matter whether it be held that the confirmation of the grant was the act of Congress of July 1, 1864, conveying the title to the land embraced within the Van Ness Ordinance (of which the Sherrebeck claim was a part); the act of March 8, 1866, granting and relinquishing to the city the four leagues confirmed by the decree of the circuit court of May 18, 1865; the date of the final survey of the four leagues, or of the patent to the city. There can be no doubt that five years, without reference to date of confirmation, is the limitation under the codes, and to our minds it is equally clear that such is the limitation under the act of 1863, when section 6, as there amended, is carefully analyzed, as it needs to be, for it is not clearly constructed, and at first reading is somewhat difficult of comprehension. This court, however, seems to have reached the same conclusion, as to its proper construction and effect, as long ago as San Jose v. Trimble, 41 Cal. 536. Judgment affirmed.

We concur: Sharpstein, J.; Works, J.; Paterson, J.

McFARLAND, J.—I concur in the judgment on the first point discussed; but what is said about the statute of limitations is very important, and may lead to serious consequences in other cases. It is the general understanding that the statute does not begin to run until after a patent. Does not this opinion overturn that doctrine?

DE GUYER et al. v. BANNING.*

No. 13,240; December 12, 1890.

25 Pac. 252.

Mexican Grants—Description—Confirmation—Conflicting Patents.—In ejectment, plaintiffs claimed under a Mexican grant that had been confirmed by the federal district court in 1857, and had been patented to plaintiffs by the United States in 1858, in accordance with the decree of confirmation which described the land by specified boundaries, giving lines and monuments. The survey made by the surveyor general in carrying out the decree of confirmation conformed to the exterior boundaries, as described in the decree, which mentioned no reservation within the limits of these exterior boundaries. There was a clause in the certificate of survey which read: "Excepting, reserving, and excluding from the tract, as thus surveyed, that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines." The land in controversy was an island lying within these lines. This island, together with other land, lying within the inner survey, was patented to defendant by the United States in 1881. Held, that the Mexican grant, as confirmed and patented by the United States to plaintiff, included the whole space lying within its exterior boundaries, and that defendant had acquired no title under his patent.

APPEAL from Superior Court, Los Angeles County; A. W. Hutton, Judge.

Houghton, Silent & Campbell and J. S. Chapman for appellants; Bicknell & White and Smith, Winder & Smith for respondents; J. E. Foulds, amicus curiae.

FOX, J.—This is an action of ejectment for the recovery of the possession of a tract of land, comprising eighteen and eighty-eight hundredths acres, commonly known as "Mormon Island," situate in the inner bay of San Pedro, in the county of Los Angeles. Defendant had judgment, from which, and

*For subsequent opinion in bank, see 91 Cal. 400, 27 Pac. 761.

an order denying a motion for a new trial, plaintiffs appeal. Plaintiffs claim under a Mexican grant, alleged, in the petition for confirmation thereof introduced and received in evidence, to have been made early in the present century, under which it is claimed that juridical possession was given in 1817, and that the same was repeatedly acknowledged by the Spanish and Mexican governments, and particularly so by a decree of the governor of the province of California, dated December 31, 1822; of which grant, confirmation was made by the district court of the United States, February 10, 1857, and patent thereon issued December 18, 1858. Defendant claims under a patent issued by the government of the United States, as upon a sale of the property as government land, describing the same as lot No. 1 of section 8, in township 5 south, range 13 west, San Bernardino meridian, in California, dated December 30, 1881. In addition to pleading his title, the defendant pleaded the statute of limitations, but upon that plea the court found against the defendant. The only question, therefore, to be determined upon this appeal, is whether or not the title passed by the Mexican or Spanish grant as the same was finally confirmed and patented by the government of the United States. The grant is of the Rancho San Pedro, made to Christobal Dominguez. The decree of confirmation is for eight and a half leagues, a little more or less, of which specific boundaries are given in the decree, giving lines and named monuments, some of which are natural and some artificial, and extending around all sides of the grant. One of these lines, as specifically described in the decree, runs directly across the outer or western border of "the inner bay of San Pedro" to La Coleta, and includes said inner bay within the exterior boundaries of the grant. As described in the decree, no exception within the exterior lines there given is made, but everything passes by the grant, which lies within those exterior boundaries. It is proved and conceded that the exterior boundaries, as described in the survey, made by the surveyor general, and recited in the patent, are identical with those given in the decree itself. But after completing the survey of the exterior boundaries, as the same are described in the decree, the surveyor adds this paragraph: "Excepting, reserving, and excluding from the tract, as thus surveyed, that portion thereof covered by the navigable waters of the inner

bay of San Pedro, and which are included within the following described lines, to wit "—and then follows with the courses and distances of the survey of such inner bay, and including therein eleven hundred and fifty-hundredths acres. What was the purpose, and what was the legal effect, of this paragraph in the certificate of survey, and the subsequent field-notes of the survey in this paragraph referred to? An understanding of the character of the "inner bay of San Pedro" may help to solve that problem, if it is one capable of solution. According to the map attached to the record it is a body of water jutting into the main body of the land, toward the east, from the principal or main bay of San Pedro, covering in its exterior limits eleven hundred and fifty-hundredths acres. The body of the mainland of the grant surrounds it on the north, south and east. It was claimed by counsel at the argument, but we do not see that the fact appears in the record, that it is inaccessible to sea-going ships, but that at times of high water it is navigable with small craft. Manifestly, and we say this more from what seemed to be conceded at the argument than from any direct evidence in the record, it is a tract of water below ordinary high-water mark, but not a portion of the deep sea, or into which deep sea going vessels can be taken. Within it Mormon island is situated. At high water this island consists of a pile of rocks, covering not much more than an acre, above the surface of the water, but at medium low water it is an island of considerable extent, and at extreme low water, according to the testimony of the defendant himself, it is not an island at all, but is accessible, dry shod, from the mainland.

The exception and reservation, if it be one in law, is "that portion thereof covered by the navigable waters of the inner bay," etc. The very language of this exception would certainly exclude from the exception the island, which cannot be, in the nature of things, "covered by the navigable waters," and this exclusion would extend to the island as shown at ordinary low-water mark. This conclusion must be inevitable, and not open to debate, if we are to be governed by these words of exception and reservation. If, on the other hand, courses, distances and quantity are to govern in the construction of this clause, and the determination of what is covered by the reservation, then the island is necessarily a part of,

and is not excluded from, the reservation. But the very language of the exception forbids such a construction. There is no word in the entire certificate of the surveyor to show that all within the survey of the inner bay is reserved, but only that part thereof which is covered by the navigable waters. This conclusion would determine this case were it not for the fact that the eighteen and eighty-eight hundredths acres patented to defendant, and of which he admits himself in possession, include much more than the island, as the same appears at even ordinary low tide. Because of this fact, it becomes necessary to go further, and inquire whether the United States had any property right within that inner bay, at the date of the patent made by the government to defendant, which its officers had the power to convey.

Returning again to the Mexican grant, of which it is conceded that juridical possession was given in 1817, and final confirmation made by the constituted authorities of the Mexican government in 1822, we find that the judicial department of our own government, in 1857, finally adjudged, determined, and decreed that this inner bay, was included within, and was a part of, said Mexican grant, and in and by said decree gave the entire boundaries, showing that it was so included. This was a final adjudication that the lands within the inner bay never were, never became, and never could become, unless by subsequent purchase, the property of the United States. It had passed into private ownership before the conquest, and this government was, by its treaty, bound to protect the title thereof in the Mexican grantee, or his successors in interest. By its decree of confirmation, the government did so protect this title, and determined that it had no interest in the lands. There was nothing in the decree to indicate or intimate that the inner bay, or any part thereof within the lines of the boundaries there given, was excepted or reserved from the grant, or to authorize the surveyor to either survey or make such an exception or reservation. The grant was one by boundaries, and not by quantity, and was complete within itself.

Turning to the patent, which, as before stated, is dated December 18, 1858, we find that it commences with and consists of recitals of the presentation of the grant for confirmation, and of all the proceedings down to and including the decree

of confirmation, and the dismissal of appeal therefrom, followed by a recital of the certificate of survey and plat made by the surveyor general, and then, and not till then, proceeds with the granting clause, as follows: "Now know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the act of Congress aforesaid of March 3, 1851, have given and granted, and by these presents do give and grant, unto the said . . . . and to their heirs, the tract of land embraced in the foregoing survey, in the respective shares," etc. There is not in the entire granting portion of this patent, nor at any place in the entire instrument, except in the recital of the certificate of survey, a word to indicate that any exception or reservation whatever is made, either in the Mexican grant, in the decree, or in the grant or relinquishment finally made by the United States. The latter is "of the tract of land embraced in the foregoing survey." What "foregoing survey"? The one which is complete in itself, and confessedly conforms minutely to the original grant, the juridical possession given thereunder, the monuments then established, both natural and artificial, and to the decree of final confirmation; or to that survey amended by adding thereto a complete, independent, and unauthorized survey, embracing eleven hundred and fifty-hundredths acres, lying wholly within the lines of the authorized survey, but to be taken out of the grant or relinquishment thereby made? This reference to survey in the granting clause of the patent is not free from ambiguity, but, when construed in the light of the decree of confirmation, under authority of which the patent was made, and of the law as to what the government then possessed and could grant in the premises, it must be held that the words "foregoing survey" refer to the first of the complete surveys given in the recital—the one which confessedly conforms to the original Mexican grant, and the decree of confirmation thereof; and that the second survey recited therein, descriptive of a reservation attempted to be made by the surveyor, but for which there was no warrant in law or in the decree, is surplusage, and of no effect. The patent was, in effect, but the execution of the decree of confirmation: United States v. Minor, 114 U. S. 242, 29 L. Ed. 110, 5 Sup. Ct. Rep. 836. The officers of the government had no power to execute the decree in part, and by the same act, or

any other, to withhold execution of the balance, or make reservation of a part of that which had been adjudged to be already the property of the claimants. Nor is there anything in the language of the patent which necessarily leads to the conclusion that the President, in executing this patent, attempted to make any such reservation, or do less than execute the decree as a whole. The act of the surveyor in making this second survey, and describing it as of an exception or reservation, was without authority, not binding upon his superiors or the government. The presumption is that the officers whose duty it was to prepare and execute the patent did not consider themselves bound by it, nor attempt to act upon it, and there is no language employed by them in the patent which necessarily overrides this presumption. "When a decree gives the boundaries of a tract to which the claim is confirmed with precision (as was done in this case), it is conclusive not only on the question of title, but also as to the boundaries which it specifies" (United States v. Hancock, 133 U. S. 196, 33 L. Ed. 601, 10 Sup. Ct. Rep. 264); and it was the duty of the surveyor, in making survey of the claim finally confirmed, "to follow the decree of confirmation as closely as practicable" (Id.; also Act Cong. July 1, 1864; 13 Stat. 334). This statute, it is true, was passed after this survey, but it established no new law—was merely declaratory of what always was the duty of ministerial officers in executing the decrees of court. In this case it was practicable to, and he did, follow the decree of confirmation minutely and exactly, and made a complete and perfect survey according to the same. That which he did afterward in the way of making addenda to his survey was in excess of his authority, and void. That the court had authority to fix and determine these boundaries definitely in its decree was settled in the Fossat Case, 2 Wall. (U. S.) 710, 17 L. Ed. 739, and United States v. Fossatt, 21 How. (U. S.) 447, 16 L. Ed. 186, and that when so fixed they are conclusive is affirmed in United States v. Hancock, supra, probably the very last case decided by that court of last resort upon such a question. It was also so held by this court in its last decision upon this question: Association v. Knight, 85 Cal. 448, 23 Pac. 267, 24 Pac. 823 (filed September 4, 1890). And it was long since established by the supreme court of the United States, and has been steadily followed in

this court, that when a specific tract of land is so confirmed according to ascertained boundaries, fixed by the decree, the confirmee takes title, upon which he may maintain action in ejectment: Stanford v. Taylor, 18 How. (U. S.) 412, 15 L. Ed. 453; Natoma Water & Mining Co. v. Clarkin, 14 Cal. 551; Soto v. Kroder, 19 Cal. 95. In such a case the patent from the United States is evidence only of pre-existing title: Waterman v. Smith, 13 Cal. 418. "Segregation was made by the decree": Mining Co. v. Clarkin, supra. Both affirmed in Mahoney v. Van Winkle, 33 Cal. 456. That when the boundaries are fixed by the decree the survey must conform thereto was also held by this court in Hale v. Akers, 69 Cal. 167, 10 Pac. 385. "The survey is not an independent act, but is an act performed under the decree, and preparatory to its [the decree] being carried into effect by a patent" (More v. Massini, 37 Cal. 436), and which patent is but the execution of the decree (United States v. Minor, supra).

But it is claimed on the part of respondent that, notwithstanding the authorities cited, and the principles therein established, the reservation attempted to be made by the surveyor general and the survey thereof was correct and lawful, for the reason, as he claims, that no title passed by the Mexican grant to any lands within the exterior boundaries of the grant, except such as were situate above ordinary high-water mark of the seashore. In the recent case of Association v. Knight, supra, we held that the pueblo did not take and hold, under the laws of Mexico, and under those laws could not acquire title to, lands situate below ordinary high-water mark of the seashore, and cited authorities to show that such was the Mexican law, and also the decree of confirmation in that case to show that by such decree, the boundary of the pueblo, at the point under consideration, was fixed by and at high-water mark, and so found and established by the decree. But this is not a parallel case. Here there is no question of what are or can be the rights of a pueblo under the Mexican or any other law. There is no pueblo at this point, and neither party claims under one, or under the laws relating to pueblos. One is claiming under a Mexican grant, the other under the United States, direct. In that case it was conceded as having been long since established by the decisions of both state and federal courts that the Mexican government could, and some-

times did, make private grants of lands extending below the ordinary high-water mark of the seashore. This was so held in Teschemacher v. Thompson, 18 Cal. 11, 79 Am. Dec. 151, and in Ward v. Mulford, 32 Cal. 365, and the grants there referred to, like the present one, were confirmed, patented, and respected by the government and the courts. But even if this contention of the respondent that nothing passed by the Mexican grant or the patent issued in execution of the decree of confirmation thereof, lying below ordinary high-water mark, be true, it still follows that so much of the judgment appealed from in this case as adjudges and decrees that the defendant is the owner and entitled to the possession of the tract of land described in said judgment, to wit, the eighteen and eighty-eight hundredths acres described in defendant's answer, and in the patent to him, is erroneous; for, according to his own testimony, which is uncontradicted, more than 17/18 of that tract lies below ordinary high-water mark, and is, therefore, land which, if it was not granted by the Mexican government, but remained a part of the public domain, became, on the ninth day of September, 1850, the property of the state of California; and the government of the United States, or its officers, had no power to make a grant thereof, or give title thereto, at the date of defendant's patent. Defendant makes no other claim to the property, except that based upon his patent from the United States, and his possession thereunder. If the island was not included in the grant under which plaintiff claims, defendant's title to that might be good, but even then it could not be good to the land below ordinary high-water mark. In our judgment, however, the title, not only to the island, but to the whole of said inner bay within the exterior lines of the Mexican grant, as described in the decree of confirmation, and in the survey of exterior boundaries, passed to the claimants under said grant, and is vested in the plaintiffs.

Judgment and order reversed.

We concur: Sharpstein, J.; Paterson, J.

I dissent: Beatty, C. J.

THORNTON, J.—I concur in reversing the judgment and order herein, but for other reasons than those stated in the

opinion of Justice FOX. I am of opinion that the decree of confirmation of the Rancho San Pedro includes what is called the "Inner Bay of San Pedro." The patent, however, contains a reservation from grant, which reservation is confined to and embraces only that portion of the inner bay above mentioned which is covered by the navigable waters of the bay. It appears from the testimony that Mormon island is not so covered. It is not so covered by the waters of the bay at ordinary high tide. I am of opinion that plaintiff is entitled to recover the island, and such other portion of the tract of land sued for, described in the complaint as containing eighteen and eighty-eight hundredths acres, as is not covered by the navigable waters of the inner bay aforesaid. The judgment and order should be reversed and the cause remanded, that the limits of such portion may be determined by the court below, and, when so determined, judgment should be rendered for it in favor of the plaintiffs.

McFARLAND, J.—I dissent. This is a pure action of ejectment. Plaintiff's asserted title to the demanded premises rests upon a patent of the United States issued for a Mexican grant under the act of Congress of March 3, 1851. By the thirteenth section of that act it is provided that after a claim under a Mexican grant shall have been confirmed, "a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same." In the case at bar, plaintiffs claim title under a patent for a tract of land known by the name of "San Pedro." The patent recites a plat and survey made under said thirteenth section of said act of March 3, 1851, and contains full copies of such survey and plat; and it then conveys to the grantees "the tract of land embraced and described in the foregoing survey." There is no other description of the land granted. Now, "the foregoing survey" does not include the land sued for in this action; indeed, such land is expressly excluded, and that certainly seems to me to end the case. How can a plaintiff in ejectment recover land which

is not included in the title deeds on which he relies? I am clearly of the opinion that the judgment and order should be affirmed.

RANKIN et al. v. AMAZON INSURANCE COMPANY.*

No. 12,807; December 13, 1890.

25 Pac. 260.

Fire Insurance—Survey of Premises.—Where a fire insurance policy refers to a survey of the insured premises and the application as a warranty on the part of the insured, the right of the company to rely on such application and survey is not defeated by the fact that they were not furnished until after the policy was delivered, and that they were written on blanks prepared for the use of another insurance company.

Fire Insurance—Keeping Watchman.—In an action on a policy, evidence that the insured premises were idle for two months, during which time the insured employed only one watchman, who habitually slept in a building three hundred feet away, with the approval of the insured, shows a failure on the part of the insured to comply with a condition of the policy requiring him to employ a watchman "to be in and about the premises by day and night" during the time that they are idle, and not merely negligence on the part of the watchman in performing his duty, and is a good defense to the action.

APPEAL from Superior Court, City and County of San Francisco; John W. Armstrong, Judge.

Action by Ira P. Rankin and others against the Amazon Insurance Company on a fire insurance policy. From a judgment for plaintiffs, defendant appeals.

T. C. Van Ness and Haggin, Van Ness & Dibble for appellant; Doyle, Galpin & Scripture (Philip G. Galpin of counsel) for respondents.

FOX, J.—1. The policy of insurance upon which this action was brought was applied for November 21, 1884, and

*For subsequent opinion in bank, see 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872.

was written up assuming the risk from 12 o'clock noon on that day, for the term of one year, but was countersigned by the general agents at San Francisco, November 24, 1884, and presumably was not delivered until that day. When delivered a part of the written portion thereof was on a rider attached and properly authenticated, the blank being insufficient to furnish room for all the written portion. On that rider, and as a portion of the written part of the policy, was the following: "Reference is hereby made to a survey and diagram, on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." The court below evidently concluded, and in that conclusion we concur, that in fact there was no survey and diagram on file in the office of Mitchell & Son, either on the 21st or the 24th of November. But the uncontradicted evidence is that Mitchell & Son were the insurance brokers who acted for and on behalf of the assured in getting the insurance, and that they promised that such a survey and diagram should be prepared, and a copy thereof furnished the insurers. Such a survey and diagram was prepared by the engineer of the Owens River Mining and Smelting Company, owners of the property covered by the insurance, and was on file in the office of Mitchell & Son, on the fourth day of December, 1884; but the evidence still leaves it uncertain whether it was so on file on the third day of December, 1884, at which time the policy was taken to the office of the insurers, and the written portion thereof rewritten upon another rider, which was duly authenticated and attached, increasing the amount of insurance allowed by $600, and winding up with the same expression as before: "Reference is hereby made to a survey and diagram on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." At some time, but at what precise time does not appear, a copy of this survey and diagram, dated December 4, 1884, the survey constituting a voluminous document consisting of questions and answers, and written upon a blank prepared for the use of another insurance company, and not of this defendant, was presented to and filed with the agents of defendant, as and for a copy of the survey and diagram, and as and for the application, referred to in the written portion of the policy, which the

brokers had agreed to furnish. This document was offered in evidence. It was signed "Owens River Mg. and S. Co., by Hoyt & Son, Applicants." The policy ran to the Owens River Mining and Smelting Company, "loss, if any, payable to Rankin, Brayton & Co." To this evidence "plaintiffs objected, upon the ground that at the time when the papers were presented to the company the insurance had already been effected, and the rights of Rankin, Brayton & Co. had vested; and upon the further ground that there was no authority upon the part of Hoyt & Son to make any contract on behalf of the Owens River Smelting and Mining Company; and upon the further ground that the paper was dated December 4th, and was made the day after the policy was made, according to the date of the last rider in the policy." This objection was sustained, to which ruling the defendant excepted, and it is now assigned as error. The question as to the authority of Hoyt & Son was unimportant. This policy, though taken in the name of the mining and smelting company, was for the immediate benefit of these plaintiffs, and the policy on its face was made, "loss, if any, payable" to them. The authority of Mitchell & Son to effect the insurance for them was amply proved, and uncontradicted. It is also uncontradicted that they promised to procure and place on file the survey and diagram. The only question is whether the fact that it was not on file when the policy was delivered defeats the right of the defendant to rely upon it, and introduce it in evidence as a part of the contract. If this question depended solely upon the clause of the policy written upon the riders, and hereinabove quoted, the right of defendant to rely upon the diagram and survey as a part of the contract of insurance, and introduce it in evidence as such, might be seriously questioned, and there are several authorities which might be cited in support of the negative of that proposition, some of which are more directly in point than Caldwell v. Center, 30 Cal. 543, cited and relied upon by respondents. But appellant does not rest its right either solely or mainly upon that clause. There is in the policy another clause which provides: "For further particulars reference is made to an application and survey No. ——,

furnished by and a warranty on the part of the assured, which is hereby made a part of this policy." Mitchell testifies that when he procured the policy he promised to procure and furnish such an application and survey, and that he did procure and furnish this one in compliance with that promise, and it is uncontradicted that he did so, and that this was the only one furnished. The contract was to be in two parts, as all these contracts are, each dependent upon the other. One of the parts was finished at one time, and in this instance, either the other was finished at another time or has never been finished. If finished, they constitute one contract; if never finished, there was never any contract. This paper, which was furnished by the agent of the insured in pursuance of his promise, answers the calls of the other part of the contract, is in the form of an application and survey, accompanied by a diagram illustrating the survey, and furnishes the ordinary information upon which the insurer's part of such a contract is usually based. It was furnished and accepted as the basis of the insurers' part of the contract in this case. That the delivery did not occur at the same time, and that it was written upon a blank prepared for the use of another corporation, makes it none the less a part of the contract upon which this action is brought, and as such it was error to refuse to admit it in evidence. The fact that it was not made at or before the execution of the policy may have deprived it of the quality of an express warranty by operation of law, under section 2605 of the Civil Code, but it still operates as evidence of representations made as inducement for the issuance of this policy (Civ. Code, secs. 2571–2577), and as such it was proper matter to submit to the jury. Whether warranty by operation of law or not, it was declared such upon the face of the contract, and unless unlawful the court has no power to eliminate it from the contract. In either event, whether warranty or mere representations, the defendant was entitled to have it go to the jury; particularly so since, even if mere representation, and found to be false in a material point, it gave the injured party a right to rescind the contract (Id., sec. 2580) at any time previous to the commencement of the action (Id., sec. 2583), and it

was admitted that, before the commencement of the action, the defendant had tendered a return of the premium, and notified the parties that the policy was canceled.

2. The next point urged by appellant is that the court erred in refusing to give an instruction asked by appellant, and in giving the instruction which it did give, in reference to what is called the "watchman clause" of the policy. The policy, as originally written or printed, contained this clause: "It is understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured to be in and upon the premises day and night." This clause was changed at the instance of the insured, by striking out the word "upon," and inserting in lieu thereof the word "about." The clause as thus framed and accepted was an express promissory warranty on the part of the insured, and that it was made and accepted with full notice, and not merely an oversight on their part, is evidenced by the fact that the change was made at their instance. The question for the jury to determine was whether or not this promissory warranty was kept on the part of the insured. Exception is taken to the refusal of the court to give each of three separate instructions asked by appellant, but only one of these exceptions is urged in argument in this court—the first. We think that instruction, as written, was correctly refused, not because it did not correctly state the law as applicable to such contracts, but because it not only stated the substance of certain evidence, but undertook to state the effect of the whole evidence tending to prove whether or not the contract had been complied with in that regard. In the instruction which the court did give, it correctly declared that the clause of the policy above quoted was a warranty that the insured would employ a watchman to be in and about the premises day and night, when the mill was idle, and that if they had failed to do so they could not recover. Neither do we think the court erred in what is subsequently said on the subject of the effect of an omission of the watchman to do his duty by negligence. That portion of the instruction is in harmony with section 2629, Civil Code, and the authorities cited in Deering's note to that section.

3. The verdict is not supported by the evidence, and is against the law as laid down by the court in its instructions,

and as established by the authorities. Insurance contracts, like others, must be enforced according to the intention of the parties: Wells v. Insurance Co., 44 Cal. 406, 407. There is no ambiguity about this contract in this particular. The insured covenanted to employ a watchman to be in and about the premises day and night, during such time as the mill was idle. There is no dispute in the evidence touching these facts: That for two months before this fire occurred the mill was idle; that the mill, "frame buildings, adjoining and communicating," with the machinery and property therein, was the immediate subject of the insurance; that during the two months the mill had so remained idle, up to and at the time of the fire, but one person had been or was employed as watchman; that he had no special instructions as to watching, either day or night; that as a matter of fact he did not watch the whole of any night, but habitually, and with the knowledge and approval of the superintendent, slept at night in a building three hundred or four hundred feet away from the mill, and was sleeping there when the fire occurred. This building was situated upon land belonging to, or in possession of, the mining and smelting company, but it would do violence to common sense to hold that it was "in" or "about" the insured property, or that a man who habitually and nightly slept in it was, while sleeping there, a watchman in or about the insured property three hundred or four hundred feet away. And if, as shown without contradiction, he habitually and nightly slept there, with the knowledge and approval of his employer, it is too much to say that he was a watchman employed to be in or about the insured premises during the night-time. An employment which knowingly and habitually suffers such a course of procedure is not such an employment as is demanded by the terms of this contract. These facts do not show mere negligence in the performance of duty, but rather failure to employ for such performance. The evidence of a failure to comply with the conditions of this clause of the policy is much stronger than it was in the case of Trojan Min. Co. v. Fireman's Ins. Co., 67 Cal. 27, 7 Pac. 4, and there it was held that recovery could not be had because of such failure. The facts here disclosed justify and call for the adoption and repetition of the language used in Wenzel v. Insurance Co., 67 Cal. 440, 7 Pac. 817: "It is ap-

parent from the uncontradicted evidence in the case that Lynch [McMurray] was not employed as a watchman of the premises, within the sense and meaning of the contract." There is nothing in Sierra etc. Min. Co. v. Hartford Fire Ins. Co., 76 Cal. 236, 18 Pac. 267, cited by respondent, in conflict with this view. Judgment and order reversed and cause remanded.

We concur: McFarland, J.; Sharpstein, J.; Paterson, J.

I concur in the judgment: Thornton, J.

INGERMAN v. MOORE et al.*

No. 12,733; December 16, 1890.

25 Pac. 275.

Employer's Liability—Contributory Negligence.—Plaintiff, an adult, had worked about defendant's sawmill for about four years, and for nearly a year as helper to the sawyer at an "edger," consisting of eight circular saws arranged upon a table four feet high. Under the table, six inches below the saws was a revolving shaft, with a collar upon it fastened by a projecting set-screw. Plaintiff testified that on several occasions he had run the edger himself, by direction of his employer, after telling him that he did not understand machinery; that the saws were stopped and started at will by pulling, respectively, two ropes which hung near; that the morning of the accident was quite dark, but there were no lights; that he had been directed to run the machine, and, while doing so, a sliver dropped upon the shaft which he attempted to remove, as he had seen the sawyer do, without stopping the saws, and while doing so his sleeve was caught by the set-screw, of whose existence he was ignorant, and his hand cut off. Held, that there was no evidence of negligence, and that he was guilty of contributory negligence.

APPEAL from Superior Court, City and County of San Francisco; T. K. Wilson, Judge.

Jarboe, Harrison & Goodfellow and Wm. F. Herrin for appellants; Pillsbury & Blanding for respondent.

*For subsequent opinion in bank, see 90 Cal. 410, 27 Pac. 306.

WORKS, J.—This is an action for damages for personal injuries brought by an employee against his employers. The defendants moved for a nonsuit, which was denied. There was a verdict and judgment for plaintiff for $12,500, a motion for a new trial, which was denied, and the defendants appeal. The facts are stated in the appellants' brief as follows: "In the month of January, 1884, the defendants were the owners of a sawmill at Port Discovery, Washington Territory, and the plaintiff was one of their employees, engaged in their sawmill in running an edger, or scantling machine, which was used for shaping lumber, and cutting it in various widths and thicknesses. The edger was about seven or eight feet in width, and from three to four feet in length, and had arranged upon it, at intervals upon its longest dimension, eight circular saws. These saws were moved by means of an engine, belt, and pulley, and made eight hundred and sixty revolutions a minute. The plaintiff stood in front of this machine, and, with the aid of a helper, who stood a few feet in the rear of him, ran the lumber through this edger to the rear thereof, where it was removed by others from the mill. About six feet to his rear, and close by his helper, was a rope, by pulling which, whenever it was necessary to stop the machine, the belt connected with it could be thrown off the pulley, and the movement of the saws stopped. The plaintiff commenced working at the mill in the year 1880, and from that time was continually employed there until the 14th of February, 1884. He had been at work on the inside of the mill, in connection with different saws, from the latter part of the year 1880. His special function from March, 1883, was that of an assistant to one Libben, who had charge of this edger or machine, and it was customary, when Libben was absent, for the plaintiff to take charge of the machine, with the aid of an assistant, who was detailed to help him. From the time he commenced his position as assistant to Libben, in March, 1883, he had at various times taken charge of and run the machine, at one time for several weeks in succession, and had been running it for several days prior to the accident. On the 14th of February, 1884, and for four days prior thereto, he was in charge of the machine, Libben being

sick and absent, and, with the aid of his helper, one Hansen, was running the machine himself. On the morning of that day, at about half-past 7 o'clock, a sliver had become detached from one of the planks that he was running through the saws and fell beneath the saws into an open box or frame upon which the saws were supported, and interfered with the free working of the machine. Beneath the saws, and six and a half inches below them, was a parallel shaft, revolving eighty-four times a minute, upon which this sliver rested. The floor underneath was open, for the purpose of allowing the chips and sawdust to fall through into the lower part of the mill. At the left-hand end of this parallel shaft, as you face it from the front, was a set-screw, which held a collar to it, and was placed there for the purpose of preventing its vibration. This screw projected about half an inch from the surface of the shaft, and was itself about half an inch square. When the plaintiff observed that the sliver had fallen into the box of the machine, instead of signaling his helper to stop the machine, he went around to the rear of it, while it was still moving at its usual velocity, and attempted to move the sliver with his hand. Instead of attempting to take it out with his right hand, he rested his right hand upon the frame of the box in which the machine was inclosed, and, with his left hand, reached across his body to the right-hand end of the machine, for the purpose of removing the sliver, when suddenly his hand was taken off, and his arm broken so that amputation became necessary. His hand was cut directly across at the wrist without any scratch or mutilation of any character, and, with some scraps of his clothing, fell down into the chute below the machine, where it was several hours afterward found."

The plaintiff testified with reference to his employment in running the machine and the way in which the accident occurred, as follows: "I am twenty-nine years old. I commenced to work at the mill of the defendants on the 24th of May, 1880. The mill was then owned by Mr. Mastick. The defendants took charge of it in 1881 or 1882. When I first went there I worked on the lumber pile. Then I commenced to work on the rollers inside, taking the lumber from the big saw. I did this kind of work about two

years and a half. Then I went to work with John Libben on this scantling machine, where I got hurt. I had been at work on that machine about nine months before I was hurt. This machine was about seven or eight feet wide, and three or four feet long. Question. How was that machine worked? What kind of power? Answer. Steam power. Q. By a belt? A. Yes, sir; by a belt. Q. With a brake or wheel? A. We had a rope to pull. Six feet away from me was a rope to pull, and generally the man who was helping had to pull that rope when they wanted to stop the machine. Q. What did you do when you started it? A. Well, there were two ropes, one to start, and one to stop. Q. So you pulled one to start, and one to stop? A. Yes, sir. Q. Did you ever run that machine? A. Yes, sir, I did. Q. When was the first time you ran it, about as near as you can recollect? I will ask you first how many times do you remember running it before the time you got hurt? A. I ran it three times. Q. As near as you can remember, tell me the first time you ran it. A. The first time I ran it about four days. Q. How long before you got hurt, as near as you can tell? A. About five months before I was hurt. Q. How long did you run it that time? A. About four days. Q. How did you come to run it at that time? A. Mr. Libben was sick and absent. Q. I want to get at who, if anybody, asked you to run it, or directed you to. A. Well, Mr. McCann told me to go there. Q. Tell the jury how, just exactly how, it happened. A. Mr. McCann told me to go and run the machine; that is all. I did not know much about machinery. He thought I could do it. I said: 'I will do my best.' He said: 'Go ahead; I think you can run it.' Q. What else, if anything, was said? A. Nothing more said at that time. He told me to go there, and I had to go there. Q. Did he give you any further instructions or directions? A. No. He gave me no instructions whatever. Q. How long did you say you ran it at that time? A. I ran it about four days. Q. How soon was that after the first time? A. About a month or six weeks after. Q. You say you ran it two days. How did you come to run it then? A. Well, Mr. McCann came and told me to run it. Q. What was said? Tell the jury all that was said about it. A. Well, I always told Mr.

McCann I was no machinist, and didn't know much about machinery, so he had to take somebody else, and he always told me he thought I was able to run it, and I had to go there. Q. I am getting at the second time. You have told about the first time. Now, I want to get at the other, as near as you can remember. A. Well, that is as near as I can remember. I always told Mr. McCann I did not know much about machinery. Q. Well, then, you went for about two days, you say? A. Yes, sir. Q. Then, when did you run it again before you were hurt, if you did? A. I think I ran it some time in November. What time, I could not exactly say. Q. In November, before you were hurt? A. Yes, sir. Q. How long did you run it then? A. About nine days. Q. Where was Libben at that time? A. He was sick. . . . . Q. Now, tell the jury what you were doing when you got hurt. A. I was trying to take the sliver out of the machine, and my hand got caught by the set-screw, and tore off. Q. Where was this sliver? A. Right underneath the machine—right underneath the saw. It prevented me. I could not lift the rollers up to put the lumber into the machine. Q. How did you come to pull the sliver out, or be pulling the sliver out? A. I could not lift the rollers, so I had to get behind the machine, and try to get the sliver out; and it was a dark morning, the lights were out, so I tried to get the sliver out, and got my hand in the machine, and caught in the set-screw. I could not see the set-screw. I didn't know the set-screw was there. Q. What did the set-screw catch on, if anything? A. It caught my jumper, my outside shirt. Q. One of those strong jackets you wear outside to keep off the dust, was it? A. Yes, sir, and that catched inside, and pulled my arm around the shaft, and tore my hand off and broke my arm, and then I got out again. Q. Had you ever pulled a sliver out of there before? A. Not in that place, a good many other places. I done just exactly as I saw Mr. Libben do. I saw him pull slivers out of the same place."

It is contended by the appellants that the nonsuit should have been granted for two reasons, viz., that the evidence failed to show negligence on the part of the defendants, and that it did show contributory negligence on the part of the plaintiff. We feel constrained by the evidence, as

it appears in the transcript, to agree with the appellants in this contention. We think the evidence fails to show negligence on the part of the appellants; but if there is any question as to this, there can be none as to the contributory negligence of the respondent. By counsel for respondent much stress is laid upon the fact that he was not regularly employed to run the machine which caused the injury, and was not competent to run and manage it; but his own testimony shows that he had been a helper on the machine for several months, and had himself run it a number of times for several days on each occasion. Besides, the accident did not occur, in this instance, because of any mismanagement of the machine, but was the result solely of carelessness on the part of the plaintiff in attempting to remove the sliver from the machine by placing his hand in close and dangerous proximity to the running saws. It was wholly unnecessary for him to run this risk. He testifies that his machine could be stopped by pulling a rope, and started by pulling another. He was a man of mature years, and was bound to know the risk and danger of taking the course he did, and as it was unnecessary for him to do so he was guilty of negligence which must prevent a recovery in this case.

It is contended that there was negligence on the part of the appellants in not having the room in which the machine was operated sufficiently lighted, but, if this be conceded, the act of the respondent in putting his hand near the saws in the dark only proves his negligence more clearly. Again, it is contended that there was negligence on the part of the defendants in having a set-screw on the shaft connected with or near the machine. But it appears from the evidence that the set-screw was necessary for the proper running of the machinery, or a part of it, and, besides, the accident, which it is claimed occurred on account of the set-screw being there, could not have occurred but for the negligent act of the plaintiff above mentioned. For these reasons the court below erred in overruling the motion for a nonsuit, and in denying the defendants a new trial. Judgment and order reversed and cause remanded.

We concur: Fox, J.; Sharpstein, J.; Thornton, J.

I dissent: McFarland, J.

BEATTY, C. J.—I dissent. There was, in my opinion, sufficient evidence of negligence on the part of defendants to go to the jury, and not sufficient evidence of contributory negligence on the part of the plaintiff to justify the court in granting a nonsuit on that ground. It is clear that the machine was dangerous to a man unfamiliar with its construction, and ignorant of the proper method of keeping it in order. If the plaintiff had expressly represented himself as competent to run and manage it, or had impliedly done so by seeking the employment, there might have been no duty resting upon the defendants to instruct or warn him as to the dangers involved in its operation. But the plaintiff's evidence showed that, so far from seeking the employment, or leading the defendants by any express or implied representations to suppose that he was competent to operate the machine, he accepted the employment unwillingly, protesting that he did not understand machinery, and that some one else should be put in charge. When a man is set to work upon a dangerous machine, under such circumstances, I think the employer is guilty of negligence if he fails to give proper instructions as to the method of operating the machine safely, and he is more specially guilty of negligence if he instructs the employee to operate it in a manner that is dangerous. Now, in this case, the only instruction ever given to the plaintiff, according to his evidence, was to do as he had seen Libben do, and in following this instruction he incurred the injury complained of. In this view of the case, a nonsuit would certainly have been improper, and the verdict of the jury is sustained by the evidence.

WRIGHT v. WRIGHT.

No. 13,749; December 20, 1890.

25 Pac. 411.

Appeal—Weight of Evidence.—The Findings of the Court founded on conflicting testimony will not be disturbed on appeal.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Albert M. Stephens for appellant; Wells, Guthrie & Lee for respondent.

PER CURIAM.—There is a clean-cut conflict in the evidence. The plaintiff testified that defendant left him, in 1885, without cause and against his wishes, and had ever since, without reason, refused to return and live with him. There was sufficient corroboration. Letters introduced in evidence and the testimony of friends and members of the family tended to show that plaintiff was happy with his wife, and treated her kindly; and his father testified that defendant told him, in 1885, she would not live with the plaintiff any longer. That she has not in fact lived with him is undisputed. The court heard the conflicting statements of the parties, weighed the evidence, and we are not at liberty to set our judgment against this conclusion, even though our conviction should be that the defendant's evidence preponderates. The court did not err in its ruling as to the admissibility of certain evidence. Judgment and order affirmed.

VITORENO v. COREA.

No. 14,055; December 20, 1890.

25 Pac. 420.

Appeal.—Where No Transcript on Appeal is Filed within forty days as required by the rule of the court, and no showing made to take the case out of that rule, the appeal will be dismissed on motion of respondent.

APPEAL from Superior Court, Contra Costa County; Joseph P. Jones, Judge.

Thomas Scott for appellant; Chase, Chase & Miller for respondent.

PER CURIAM.—Appeal was perfected in this case March 5, 1890. No transcript has been filed, and no showing is made taking the case out of the operation of the rule requiring transcripts to be filed within forty days after the perfection of appeal. On motion of respondent, it is ordered that the appeal be dismissed.

ALEXANDER v. JACKSON et al.*

No. 13,489; December 23, 1890.

25 Pac. 415.

Homestead.—A Married Man Bought Certain Lots, Terms Part Cash, balance on time, deed to be given on payment of balance, lots to be forfeited on failure to meet payments. He then built a house on the lots and moved into it with his family. The payments on the lots and the house were made with the community property. The wife executed and filed a declaration of homestead on the lots. Before final payments on the lots had been made, the husband assigned the contract and sold the house to plaintiff, who had knowledge of the homestead declaration, and who paid the balance of the purchase money and received a deed of the lots. Prior to the assignment to plaintiff, the wife offered to pay the vendor the amount due on the lots on condition that he would convey them to her or to her and her husband jointly. Held that, as at the time the declaration of homestead was filed the title was in the vendor, the wife acquired no rights in the property.

Ejectment—Judgment.—Where in Ejectment There is Coupled with a judgment for defendant an order that a certain sum be paid plaintiff, the leaving of this sum by defendant with plaintiff's attorney, which he refuses to accept, is not a satisfaction of the judgment so as to prevent an appeal by plaintiff.

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*For subsequent opinion in bank, see 92 Cal. 514, 27 Am. St. Rep. 158, 28 Pac. 593.

APPEAL from Superior Court, Stanislaus County; William O. Minor, Judge.

Wright & Hazen for appellant; L. J. Maddux for respondents.

THORNTON, J.—This is an action of ejectment for lots 27 and 28 in block 86 in the town of Modesto, in which judgment passed for defendant Mary Jackson. Plaintiff appeals from the judgment on the judgment-roll. There is a motion to dismiss the appeal, which will be hereafter considered. The complaint is in the form usual in the action of ejectment. The allegations of the complaint are denied by defendant Mary Jackson, except as to possession when suit was brought. In her answer she sets up a defense that in April, 1869, she and W. A. Jackson intermarried in this state, and have since been husband and wife; that sometime in 1881 her husband entered into a contract in writing with Charles Crocker for the purchase of the lots of land above mentioned; that about September, 1884, her husband, W. A. Jackson, erected on these lots a residence of about the value of $1,500; that the money paid for the lots in suit and the house was the joint earnings of herself and husband, since their marriage; that defendant and her husband and children have, since it was built, made this house their home; that on the twelfth day of August, 1885, defendant duly executed and filed in the proper office a declaration of homestead on these lots; that by virtue of the contract entered into between Crocker and her husband, the latter was to pay Crocker the sum of $75 for each lot in installments, with interest, etc.; that on the 26th of October, 1885, there was not to exceed $35 due Crocker on the purchase price of these lots, on the payment of which her husband was entitled to a deed from Crocker; that he (her husband) had abundant means to pay the purchase price; that he fraudulently refused to do so to prevent the conveyance of these lots to him, and that he might fraudulently prevent her from acquiring a homestead in the property; that in October, 1887, her husband made a pretended assignment of the contract of purchase to the plaintiff, and on the same day pretended to enter into a contract by which he was to sell and transfer

to the plaintiff the house above mentioned; that this contract and assignment were entered into by the plaintiff and her husband for the purpose of cheating and defrauding her of her homestead; that at the time plaintiff accepted the assignment and contract he well knew that the purpose of the same was to cheat and defraud her of her homestead right; that in October, 1887, plaintiff presented the assignment to Crocker, and obtained a deed for the property; that this deed is the only title by which plaintiff claims the ownership of the property in controversy, and that it is void. It appears from the decision that the court found that W. A. Jackson, in 1884, purchased from Crocker, who then owned them, the lots in suit. The contract for the purchase of lot 28 was executed on the 28th of April, 1884, and that for lot 27 on the 7th of August, 1884. Other lots, including lot 29, were embraced in the contract of April, 1884. The contracts are similar in their terms. The purchase price of each lot was $75. Twenty-five dollars on each lot was paid when the contract was executed. The remaining $100 ($50 for each lot, 27 and 28) was to be afterward paid in two equal installments. The installments were to bear interest at the rate of ten per cent per annum. In each contract it is stipulated that if the purchase price is paid as set forth in it, with cost of conveyances, then W. A. Jackson will be entitled to a deed for the lots, otherwise the contract is null and void, and the amounts paid forfeited. If forfeited Jackson thereafter to be the tenant of Crocker, liable to be dispossessed upon three days' notice and to be liable to pay a rent of $15 per month for any term he may remain in possession after forfeiture. A payment was made on the 26th of October, 1885, for which a receipt was given by Crocker, in which the same provisions were inserted as to forfeiture on failure to pay, tenancy, liability to dispossession and the payment of rent, but at $5 per month for possession after forfeiture. After the purchase, W. A. Jackson and Mary Jackson entered into possession of the lots, and have ever since been in possession. In September, 1884, W. A. Jackson erected a dwelling-house and other improvements on lots 27, 28, and 29, at a cost of about $1,300. The marriage of defendants is found as set forth in the answer, and stated above. Upon the completion of these buildings, defendants

and their children entered into the dwelling-house and have ever since made it their home. The execution of the declaration of homestead is found as above stated from the answer. On or about the 6th of October, 1887, plaintiff and W. A. Jackson entered into an agreement for the purchase and sale of the dwelling-house and improvements, by which plaintiff was to pay W. A. Jackson therefor the sum of $1,500, less such sum as plaintiff should be compelled to pay Crocker for the lots 27, 28, and 29. W. A. Jackson at the same time made and delivered to plaintiff a writing by which the former surrendered and relinquished to the latter all claims to receive a conveyance for the lots just mentioned, and authorized the plaintiff to take and demand a conveyance there or in his own name. At the same time, plaintiff paid to his vendor the sum of $100 as part payment for the improvements on the lots. On the 15th of October, 1887, plaintiff paid to Crocker the balance due on these lots, and Crocker then executed to him a conveyance thereof. The balance due on the lots described in complaint (27 and 28) was $35.35 principal, and $5.86 interest. Plaintiff, on the 3d of November, 1887, paid to Jackson the further sum of $335.20, and executed to him his promissory notes in writing for $1,000, and also executed to him a mortgage on the three lots to secure their payment. It is also found that the money, notes, and mortgage were the full purchase money of these lots, and that Jackson thereafter sold, assigned, and delivered the notes to one T. W. Drullard as security for money borrowed of him, of which notes and the mortgage Drullard is now the holder as security for this money. On the 6th of October, 1887, and long prior thereto, plaintiff had full actual knowledge of the declaration of homestead above stated, and that Mary Jackson claimed and occupied the premises as a homestead. The plaintiff, immediately after the 3d of November, 1887, demanded possession of the lots sued for of Mary Jackson, which she refused to deliver, and threatened him with violence if he attempted to take or have possession of them. All the charges of fraud on the part of W. A. Jackson and of the plaintiff are negatived by the findings. It is further found that Mary Jackson offered to pay Crocker the balance due him on the lots sued for in December, 1886, upon the condition that Crocker would convey them to her,

or to her and her husband jointly; that she had full notice and knowledge of the right and title of the plaintiff to the premises ever since the 3d of November, 1887; that Mary Jackson and her husband have each had, since the date last mentioned (she of her separate property), sufficient means to pay the balance of the purchase money due on the lots in litigation, and that Mary Jackson is entitled to the judgment of the court. Judgment was accordingly entered in her favor, and it was by the judgment further ordered that "defendant Mary Jackson pay to the plaintiff the sum of forty-seven and twenty-one one-hundredths dollars, balance of the purchase price paid on the lots mentioned, with the interest on the same at seven per cent per annum from date hereof."

We cannot see that Mary Jackson derived any right by her execution and filing of the declaration of homestead. Conceding that her husband had some equitable interest in the premises, still whatever he had he was competent to sell and transfer it. This is so, though the payments made by her husband were the earnings of the joint labors of herself and husband. Whatever interest was thus acquired was community property, of which the law invests the husband with the like absolute power of disposition (other than testamentary) as he has of his separate property: Civ. Code, sec. 172. The husband sold and transferred his interest in the land involved herein to the plaintiff, as he had a right to do. The vendor (Jackson) did not have the legal title to the property, but only the right to get it from his vendor, Crocker, on payment of the purchase money. The sale and assignment to the plaintiff transferred to him the right to have the legal title conveyed to him on payment of the unpaid balance of the purchase money. The purchase was fair in all respects. The court below expressly found that there was no fraud in any of these transactions between W. A. Jackson and plaintiff in regard to the rights of Mary Jackson. The question of fraud may then be laid out of the case. As the case is presented in the record, the law imposed no obligation on the husband to the wife to complete the purchase and procure a deed so as to make possible the acquisition of a homestead by her. Granting that in foro conscientiae there was an obligation binding the husband to pay the balance, and procure from Crocker a conveyance, such obligation was of the class styled

"imperfect," for the breach of which no redress can be had in a court of justice. The husband had lawful right to refuse to complete his purchase (Hicks v. Lovell, 64 Cal. 14, 40 Am. Rep. 679, 27 Pac. 942; Snodgrass v. Parks, 79 Cal. 55, 21 Pac. 429), and the wife cannot be heard to complain of it. When the declaration of homestead was executed and filed by Mary Jackson, the legal title was in Crocker, and he could not have been compelled to convey the land at the time of the transfer of the contract by Jackson to the plaintiff. The whole purchase money had not then been paid, and Crocker was entitled to hold onto the legal title, until he was paid the sum agreed on. Surely Mary Jackson could not, by executing and filing a declaration of homestead, affect Crocker's right to the land or the right of the plaintiff to whom Crocker might, under the facts of this case, have lawfully conveyed and did lawfully convey it. A right cannot be acquired by filing a declaration of homestead on the land of another. This point, if ever open to contention, is no longer debatable in this state: See Snodgrass v. Parks, supra. Crocker conveyed the legal title to the plaintiff. The filing of the homestead declaration invested Mary Jackson with no title to the land in suit, and did not detract from or affect in any way the potency of this title acquired by plaintiff by Crocker's conveyance to him.

The motion to dismiss the appeal is made on the ground that the judgment had been satisfied. The court gave judgment in favor of Mary Jackson, thus holding that she was entitled to the possession of the lots in controversy, and that plaintiff was not, and then ordered and adjudged that she pay to plaintiff a sum of money "because of the purchase money paid on the lots involved." This was done without any appropriate pleadings. She did not offer to pay any money, nor did she set forth in her answer any state of facts calling for any such judgment. The matter set up in the answer was pleaded merely as a defense to the action, which turned on the issue of right to the possession of the land sued for. There was no pleading on her part in which a demand was made for relief on payment of any sum of money. The portion of the judgment referred to (quoted above) was entirely outside of any issue joined in the cause before the court. It was entirely foreign to anything set forth in either com-

plaint or answer. There was nothing in the case on which to base it. It is suspended as it were in mid air, without support of any kind or description, and is entirely irregular and erroneous. The record shows this state of facts in regard to this alleged satisfaction: That Mary Jackson's counsel on the 31st of August, 1888, after the appeal was taken, left on the desk of one of the attorneys for plaintiff the sum of $45.86, thus tendering it to plaintiff as payment of the sum adjudged by the court to be paid to plaintiff by defendant; that the counsel for plaintiff refused to accept it, and still holds it for defendant. There is no ground for holding such a tender or payment a satisfaction of the judgment. The motion to dismiss the appeal is denied and the judgment is reversed, with directions to the court below to enter judgment on the findings for the plaintiff, with a judgment for rents and profits at the rate of $15 per month from the 31st of October, 1887, to the date of the judgment. So ordered.

We concur: Paterson, J.; Sharpstein, J.

FOX, J.—I concur in the order reversing the judgment of the court below on the ground that said judgment as entered is not supported, either by the pleadings or the findings. But I am not prepared to say that the defendant Mary Jackson has not a homestead interest in the premises which she is entitled to have protected, under proper pleadings.

We dissent: McFarland, J.; Beatty, C. J.

BARKLY v. COPELAND.*

No. 13,520; December 26, 1890.

25 Pac. 405.

Slander—Evidence of Defendant's Wealth—Declaration of Coconspirator.—In an action for slander in charging plaintiff with associating with another in a theft of certain cattle, declarations made by such other after the alleged transaction was completed are inadmissible to show that plaintiff was associated with him.

*For former opinion, see 86 Cal. 483, 25 Pac. 1.

Clay W. Taylor, Jackson Hatch and A. M. McCoy for appellant; Chipman & Garter, John F. Ellison and L. V. Hitchcock for respondent.

PER CURIAM.—Respondent's petition for a rehearing is denied. A re-examination of the record has not only confirmed us in the opinion that our decision was correct as to the ground upon which the judgment and order appealed from were reversed, but has satisfied us that we erred in sustaining the ruling of the superior court last noticed in the opinion of Commissioner Foote. Mrs. Mandeville's testimony, in regard to statements of Speegle, to the effect that plaintiff was his confederate in the proposed larceny of Polk's cattle, was clearly incompetent as hearsay, and not within the rule of People v. Collins, 64 Cal. 295, 30 Pac. 847. The decision in that case was merely that, after competent evidence of a conspiracy to commit a crime, the declaration of one conspirator accompanying an act done in furtherance of the common design, while the conspiracy is rife, is competent evidence against his confederate. This is no doubt correct, but it is not the law that a conspiracy between A and B can be proved as to either by the declarations of the other, as was allowed in this case, and our decision sustaining the ruling of the superior court on this point should not become the law of this case, or a precedent for others.

WINDHAUS v. BOOTZ et al.*

No. 12,991; December 30, 1890.

25 Pac. 404.

Fraudulent Conveyances.—The Transfer of a Debt by a Creditor to a third person, to whom the debtor afterward makes a part payment, and executes a note for the balance, constitutes the transferee the "successor in interest" of the creditor, within the meaning of Civil Code, section 3439, which renders all conveyances by a debtor, made with the intent of defrauding any creditor, void as against all creditors and their "successors in interest." [1]

[1] **Cited** in note in Ann. Cas. 1912D, 550, on the validity of assignment of right to file bill in equity for fraud committed on assignor.

Fraudulent Conveyance.—A Gift of Land by a Father to His Son is not void as against creditors of the father, unless the latter had not, at the time of the gift, sufficient property subject to execution to satisfy his debts.

Fraudulent Conveyance—Gift to Son.—The Return of an Execution nulla bona five years after the making of the gift is not sufficient to establish the father's insolvency when the gift was made.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

F. J. Castlehun for appellant; H. H. Lowenthal for respondents.

WORKS, J.—This was a suit by a judgment creditor to have declared fraudulent and void certain transfers of real property by the defendant Adam Bootz to his wife and children. The trial court gave judgment for the defendants, and the plaintiff appeals.

The court found that there was no fraudulent intent, and that the grantor was solvent and able to pay his debts at the time the deeds were made. Whether this finding was sustained by the evidence or not is the only question necessary to examine.

It was admitted at the trial that the deeds were deeds of gift; and the evidence shows, without conflict, that at the time of their execution the donor was indebted to one Severin in the sum of $1,000. Subsequently Severin became in need of money, and borrowed $1,000 from the plaintiff, and it was agreed between the parties that the indebtedness of the donor to Severin should be transferred to the plaintiff, and that due from Severin to the plaintiff should be released. This was done, but, instead of the old note being transferred to the plaintiff, the donor made a payment to her of $200, and gave a new note for the balance, viz., $800. The form of the indebtedness was changed, and the amount was reduced, but, in substance, it was a continuation of the old debt; and, in our opinion, the plaintiff was "the successor in interest" of an existing creditor within the meaning of section 3439 of the Civil Code. The question of intent was one of fact (Civ. Code, secs. 1227, 3442), and the bur-

*For subsequent opinion in bank, see 92 Cal. 617, 28 Pac. 557.

den of proving the fraudulent intent rested upon the plaintiff. The right of a creditor to go upon property conveyed by his debtor to a third party rests upon two foundations, viz., that the conveyance was fraudulent, and that the grantor had not other property at the time suit is brought, subject to execution, out of which his debt can be made. Proof that the debtor made the conveyance without consideration, that he was then indebted, and that he had not other property at the time of the conveyance, subject to execution, to satisfy such indebtedness, would be sufficient prima facie to establish the fact that the conveyance was fraudulent as against creditors. If the debtor had other property at the time of the conveyance, sufficient to satisfy his debts, the fraud would not be made out unless there was other evidence. If the debtor has other property at the time suit is brought, sufficient to satisfy his debts, his creditors are not injured, no matter what the original intention in making the conveyance may have been; and the creditor, not being injured, has no cause of action, and no right to subject property in the hands of a third party to the payment of his debt. It would seem to be unnecessary to cite authorities to sustain so plain a proposition, but we refer to Albertoli v. Branham, 80 Cal. 632, 13 Am. St. Rep. 200, 22 Pac. 404, in which this court said: "Where a creditor attacks a transfer of property made by his debtor on the ground that such transfer was made to defraud, hinder, or delay creditors, facts must be alleged showing that the conveyance was made in such manner and under such circumstances as to have that effect. Therefore it must appear that, at the time the conveyance was made, the debtor had not other property subject to execution out of which his debts could be satisfied: Evans v. Hamilton, 56 Ind. 34; Deutsch v. Korsmeier, 59 Ind. 373; Pfeifer v. Snyder, 72 Ind. 78. This allegation is necessary to show that the conveyance was in fact fraudulent as against the creditors. If the debtor has other property, subject to execution, sufficient to satisfy his indebtedness, the conveyance cannot amount to a fraud on his creditors; and, where the attempt is made to set aside a conveyance on such grounds, it must appear from the complaint that, at the time the action is commenced, the debtor had not other property sufficient to satisfy his debts:

Bruker v. Kelsey, 72 Ind. 51; Sherman v. Hogland, 54 Ind. 578. This is for the reason that the conveyance, although made for the purpose of defrauding creditors, is valid as between the parties, and cannot be set aside, unless it appears to be necessary for the protection of the creditor, and no such necessity exists if, at the time he commences his action, there is other property of the debtor out of which his debt can be made."

The complaint in the case at bar contained these necessary allegations, and was sufficient. But there was no evidence even tending to show that, at the time the conveyances were made, the grantor was not possessed of other property amply sufficient to satisfy his debts. The declarations of the grantor, relied upon by the appellant as establishing the fact, do not relate to the time of the conveyance. An execution was issued and returned nulla bona, but this was several years after the conveyances were made; and, while this was sufficient prima facie to prove his insolvency at that time, it could not be held to establish the fact that he had no property nearly five years before. Judgment and order affirmed.

We concur: De Haven, J.; Paterson, J.

DIETZ v. MISSION TRANSFER CO.*

No. 13,915; December 31, 1890.

25 Pac. 423.

Deed—Reservation of Oil and Minerals.—The owners of land conveyed a part of it to plaintiff, with a reservation to them and their assigns of "the exclusive right to all oils, petroleum, asphaltum, and other kindred mineral substances," and the right to do whatever was necessary to obtain and transport such minerals, including the erection of proper machinery, and the laying of pipes. The rest of the original tract was conveyed in parcels to other persons, with the same reservation, and finally the reserved rights and interests in the whole were granted to defendants. Held, that defendants have

*For subsequent opinion in bank, see 95 Cal. 92, 30 Pac. 480.

no right to the possession of plaintiff's land further than is necessary to the exercise of the rights reserved in that tract alone.

Deed—Reservation of Minerals.—Where, in Ejectment, it is shown that defendants have taken possession of a part of plaintiff's land, to enable them to exercise the rights reserved in the rest of the original tract by their grantors, and that they are not seeking the minerals in question on plaintiff's land, and that none exists there, plaintiff is entitled to recover the possession of the land occupied by them.

Deed—Reservation—Ejectment.—A Judgment in a Former Action determining that a lease to plaintiff, granted before he obtained his deed, of the right to take such minerals in the entire tract had expired, and enjoining him from interference with defendants' right to take such minerals, they having purchased it from his grantors, is no bar to such action of ejectment.

Adverse Possession—Destruction of Structures—Actual Possession.—Plaintiff's recovery cannot be defeated on the ground of defendants' adverse possession, where the evidence shows that before the statute had run the structures by which defendants held possession were carried away by flood, and rebuilt in a different place on plaintiff's land; for, as defendants were trespassers, their possession was adverse only to the extent of the land actually occupied by them.

Deed of Structures—Estoppel to Claim Land.—Plaintiff's deed to defendants of all structures erected by him on the land, for the purpose of exploring for, obtaining, and transporting such mineral, will not estop him to claim title to, and the right of possession of, the land on which such structures stand.

APPEAL from Superior Court, Ventura County; B. T. Williams, Judge.

Noble Hamilton and Joseph A. Joyce for appellant; Charles Fernald and John J. Boyce for respondent.

WORKS, J.—This is an action of ejectment. The common grantors of the plaintiff and defendant were the owners of a large tract of land, including the land in controversy in this action. They subdivided the land, and sold it in several tracts. One of these tracts, being the one now in litigation, was conveyed to the plaintiff. The deed conveying the land contained this reservation or exception: "Excepting and reserving to the parties of the first part, and their servants, agents, and assigns, the exclusive right to all oils, petroleum,

asphaltum, and other kindred mineral substances, and the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the said premises, together with the right of way over and through any and all parts of said premises, for the purpose of going to and coming from said works, and transporting machinery, tools, implements, and supplies for said works, and of transporting said substances to a market, and the right to lay pipes to conduct oil, and the right to dispose of said substances, and of transferring to their grantees thereof the same rights as are herein reserved to the parties of the first part; but not to destroy or injure any crops growing upon, or any improvements on, said premises, such as buildings, trees, vines, roads, inclosures, without making just compensation for such injury or destruction, reserving, also, to the parties of the first part the right of way for a road or roads over and across said premises, for the use of tenants or vendees of adjoining and other lands of said rancho." A like reservation or exception was contained in conveyances of other parts of this larger tract to other parties. Subsequently, said grantors conveyed to the defendant in this action the estate or interest in the whole tract reserved or excepted by these conveyances. The complaint is in the ordinary form. The answer, in one defense, sets up these conveyances; that the defendant was entitled to all of the rights reserved or excepted by said conveyances, and alleged further: "That prior to the commencement of this action, and on or about the second day of July, 1883, this defendant entered into the possession of its estate in said lands, as hereinabove particularly described, and then at once began, in good faith, to exercise open and notorious acts of ownership over the same, under claim of right and title thereto, and then, at great expense, began the exploration for, and the development of, said oil interests, and the erection of costly machinery, derricks, rigs, buildings, storage-tanks, and pipe-lines upon said premises, and defendant has thence, hitherto, continued, in good faith, the progress thereof, and the development of said territory for said oils; that the respective estates of the plaintiff and the defendant in the premises described in said amended complaint are of such a kind and character that the possession of the surface of the soil thereof has been held and enjoyed by each sepa-

rately, to the extent and for the benefit of their said several, respective, separate estates, freeholds, and property therein, and not otherwise, ever since plaintiff and defendant acquired their said several, respective, separate interests and estates in said real property; and that this defendant is now the owner, seised and possessed in fee simple absolute, and in the actual occupation and possession of the said estate and interest in said real property described in the amended complaint of plaintiff herein, as particularly, and specifically, and at large set forth and described in this answer." The answer also pleaded the statute of limitations, a former adjudication, and an estoppel by deed, which will be further noticed hereafter.

The court below found the interests in the land in the plaintiff and defendant, as above stated, and, among other things, found "that the plaintiff in this action has been, since said twenty-third day of November, 1882, continuously, to the present time, in the possession and enjoyment of the estate so conveyed to him by the said Carpentier and Steinbach, but has not held, occupied, or enjoyed any part or portion of the excepted estate, reservations, rights, or privileges excepted and reserved by his deed of that date, and the defendant has never ousted or ejected plaintiff from any portion of his said estate, and the defendant does not now withhold the possession thereof from the plaintiff. That thereafter, and in the month of May, 1883, this defendant entered upon said land and premises, as hereinabove, and in said amended complaint, described, and took possession and the actual occupation of all of its separate estate therein, and exercised and enjoyed the entire and exclusive use of, in, and to said excepted estate and reservations, rights, and privileges, and that said defendant has continuously, from said date to the present time, so exclusively occupied, used, enjoyed, and controlled said excepted estate, and said reservations, rights, and privileges. That the entry of the defendant in this action upon said described tract of land was under and by virtue of said instrument in writing, made by the said Steinbach and Carpentier to the said Whaley, by which the said excepted estate and interest in said tract of land, and the reservations, rights, and privileges in, over, and upon the same were sold and conveyed to the said Whaley, and under and by virtue of the

transfer, sale, assignment, and conveyance thereof by the said Whaley to the said defendant. And the said defendant never did at any time enter upon the separate estate of the plaintiff in said premises, nor in any manner oust or eject the plaintiff therefrom; but said entry was made, and said occupation and possession taken and acquired, by defendant, and held and enjoyed solely and exclusively for the rightful occupation and enjoyment of said excepted estate, and said reservations, rights, and privileges. That the said several respective estates, interests, rights, and privileges of the plaintiff and the defendant in, over, and upon the particular tract of land hereinabove, and in said amended complaint, described are separate, distinct, entire, and complete in themselves, and that the possession of the plaintiff and the defendant of the surface of the soil of said tract is for the benefit, advantage, use, and enjoyment of the respective and separate estates resting and being in each. And that said respective and separate estates are of such a kind and character that the possession of the surface of the soil of said tract of land can be held and enjoyed by each separately, to the extent and for the benefit of each of said several, respective separate estates, freeholds, and property, for the respective uses, and purposes, and rights of each resting and being in plaintiff and defendant; and that the possession has been so held and enjoyed by the respective parties hereto ever since the acquisition by each of their respective interests and estates in said real property. That the defendant, in the month of May, 1883, entered upon said land and premises hereinabove, and in the amended complaint of plaintiff, and in the answer thereto of defendant herein described, and took possession and actual occupation of its estate therein, in the same manner, and to the same extent, as it now occupies and enjoys the same; and that, continuously from said date, its possession has been by an actual, open, and notorious occupation, under claim of right and title to said estate, founded upon said various written agreements and conveyances, made by the said Steinbach and Carpentier, to it and to its predecessor, the said Whaley, and it has held, occupied, and enjoyed said possession as the owner of said excepted estate, reservations, rights, and privileges, as its own absolute property, and in hostility to the plaintiff's title, and to the whole world. That

said possession and occupation have been continuous, open, notorious, and uninterrupted from said month of May, 1883, to the present time, and said defendant has paid, during said time, all state, county, and municipal taxes levied and assessed upon the same." The court also found in favor of the defendant on the defenses of former adjudication, the statute of limitations, and estoppel by deed, and, that no question might arise as to the findings covering the issues, there was also a general finding that all of the allegations of the defendant's answer were true. Upon these findings, the court concluded as follows: "(1) That defendant, the Mission Transfer Company, a corporation in this state, was, at the time of the commencement of this action, and now is, the sole owner in fee simple of the excepted estate, with the reservations, rights, and privileges set forth in the answer of the defendant herein, and in the deed of Steinbach and Carpentier to plaintiff, A. C. Dietz, dated November 23, 1882, excepted and reserved, and subsequently conveyed by Steinbach and Carpentier to the defendant herein, with the right to perpetually use said premises in the manner, and to the extent, in said deed, and hereinabove in these findings set forth; (2) that plaintiff has no right, title, or interest, or any estate whatever in or to such excepted estate, or the reservations contained in said deed, and that no estate therein passed to plaintiff by said deed of November 23, 1882, or otherwise; (3) that the plaintiff is not entitled to recover against defendant in this action, by reason of defendant's occupation of the tract of land and premises described in the amended complaint and answer herein, and in these findings; (4) that defendant is entitled to his costs and disbursements in this action." It must be evident, at a glance, that some of these findings are entirely inconsistent with each other, and that the findings and conclusions of law have left the case in utter confusion. The court below, as appears from its conclusions of law, seems to have been laboring under the impression that the plaintiff was attempting to recover the interest or rights reserved or excepted by the original grantors, and subsequently conveyed to the defendant. The findings and conclusions seem to be based upon this theory, and, so treating the case, the decision was against the plaintiff. Viewing the case in this light, no doubt the conclusion reached by the

court was right. But such was not the question presented, and the conclusions of law are almost entirely aside from the real question in the case. It was not a question whether the plaintiff or defendant, or either of them, owned the interests claimed by them respectively, but which of them was entitled to the possession of the property, conceding their titles or interests to be as claimed by each.

Counsel on both sides discuss in their briefs, at great length, whether the clause in the deeds above referred to, and set out, was a reservation, or an exception; but we think it is entirely immaterial to this controversy whether it was one or the other. The same may be said of the controversy in the briefs, as to whether the interest of the defendant was a corporeal hereditament, or estate in the land, or a mere incorporeal hereditament or easement. As we construe the deed to the plaintiff, it conveyed to him the fee simple title to the land, subject to the right of the grantors and the defendants, as their successors in interest, to enter upon the land, and occupy it for the purposes mentioned in the deed. For those purposes, and none other, the defendant was entitled to the possession of the land, or so much thereof as was necessary for such purposes, and for such a length of time as it was necessary for it to occupy it for such purposes, and no longer. It makes no difference, therefore, whether its interest in the land constituted a title to a part of the land itself or not. If it did, it was only entitled to go upon the land for the purpose of severing its part of the land from that of the plaintiff, and removing it therefrom. It had no right to enter upon and hold its part of the land, where situated, to the exclusion of the plaintiff. The plaintiff was entitled, under his deed, to the possession of the surface of the land. The defendant was entitled to take possession of and occupy the plaintiff's land, for the purpose of extracting therefrom the mineral substances contained therein, if any, to explore and excavate the lands, for the purpose of ascertaining whether it contained such substances or not, and, if found, to erect the necessary buildings and machinery, put down pipes, and to make and use such roads as were necessary to remove the oils or other substances from the land. The deed also gives the defendant the right of way for a road, or roads, over and across the premises, for the use of tenants or vendees of ad-

joining and other lands. This clause in the deed has no connection with the defendant's interest in the land, which is only a right to enter upon this and other tracts of land for a temporary purpose, but applies to tenants and vendees of the other tracts, to whom the original grantors or their grantees might sell or lease the property. Therefore, this last clause in the reservation, or exception, need not be further noticed.

It will be observed that the defendant alleged in its answer, and the court found, that it went into possession of the land, and began, in good faith, to exercise notorious acts of ownership over the same, and at a great expense began the exploration for, and development of, said oil interests, and the erection of costly machinery, derricks, rigs, buildings, storage-tanks, and pipe-lines upon said premises, and that it has continued in good faith the progress thereof, and the development of said territory for said oils. This allegation in the answer is defective, in not alleging directly that the entry of the defendant, and other acts done, were for the purpose of developing and extracting oil from this land. It seems, however, to have been treated as such an allegation at the trial, and found upon as such by the court. It is insisted by the appellant that the finding of the court that the defendant was in possession for the purpose of developing or extracting oil from the land in controversy is not sustained by the evidence, and that the evidence shows, beyond any controversy, that the buildings placed upon the plaintiff's lands, and the pipes put down, and roads made and used thereon, were placed thereon and used for the sole purpose of extracting and removing oil from other and different lands, and that the evidence shows that no attempt had ever been made by the defendant to explore the plaintiff's land for oil, or other substances mentioned in the reservation or exception, and that, in fact, the evidence shows that no such substances existed in or upon this land. We have examined the evidence carefully, and find the appellant to be right in this contention. The evidence not only fails to show that the respondent's possession was taken for the purpose of developing and extracting oils or other substances from the appellant's land; but the respondent's own testimony shows affirmatively and conclusively that it took possession, and constructed buildings,

and other structures, and put down pipes on the plaintiff's land solely for the purpose of developing, extracting, and removing oils from other and different lands, and that it had made no effort to develop oil on the plaintiff's land. Not only so, but the evidence failed to show that the land contained any oil, or other substances, included in the defendant's right in the land and tended strongly to show that it did not contain any such substances. It was contended by the respondent that it had the right, under the exceptions and reservations in the several deeds made to the plaintiff and others, to occupy and use all of the land for the purpose of developing and extracting oil from any part of it. But there is nothing in the plaintiff's deed giving any such right. On the contrary, the reservation or exception contained in the deed, so far as it gives the right to enter upon and occupy the land, is confined in plain and unambiguous terms to the development and removal of oil and other substances from the land described in the deed. To hold that the defendant could enter upon, occupy, and use the land for its convenience in extracting and removing oils from another and different tract of land would be to vary the terms of the deed in a material respect, and make for the parties a new and different contract. This the courts have no power to do. What we have said is applicable to the right to put down pipes to convey the oil. This provision, although not limited in express terms to oil taken from the land, must be construed in connection with the other rights granted, and be limited in the same way. For these reasons, the finding of the court that the defendant was rightfully in possession of the land occupying its own estate therein, and other findings based upon this theory of the defendant's rights, are not sustained by the evidence, and the conclusions of law founded upon these findings rest upon an erroneous view of the law.

The respondent attempts to justify the decision of the court below on the ground that the plaintiff's cause of action was barred by a former judgment. But we are quite clear that the questions adjudicated and determined in the former action, and the one now before us, are not the same. It appears from the pleadings in the former action that the appellant had, prior to the execution of the deed to him, leased from the owners of the entire tract above mentioned the right to take oil and other substances from the same, and the lease gave him

the option to purchase the perpetual right to take such oil, and other substances mentioned, from the whole tract, on certain conditions, and bound him to give up possession at a certain time, in case such perpetual right was sold to other parties; that the appellant had failed to buy said right; that it had been sold to the respondent who had made improvements, and expended large sums of money in making the improvements necessary for developing the oils and other substances taken from said lands; that the appellant had refused to surrender the possession of the property, and was claiming the right to still extract oils from the land, and refused to permit the respondent to enter upon the same for the purpose of exploring for, developing, and extracting the oils and other substances from the land. The judgment of the court in that case was against the appellant, that his lease or license had expired; that the respondent was entitled to the possession of the land for the purposes before mentioned, and enjoined the appellant from asserting or exercising any rights under said lease or license, and also enjoined him from preventing the respondent from entering upon the land for the purposes mentioned. It will be observed that the case relied upon as a bar to this action presented an entirely different question from the one now before us. There the question was as to the right of the appellant to hold possession of the whole tract of land, and extract oil from it under a lease. Here there is no question as to the right of the appellant to hold the land under a lease, or to extract oil from it, nor is such a right on the part of the respondent involved in this case. Here, the appellant asserts the right to the possession as owner of the soil of a part of the tract, and not the right to extract oil from it. He does not dispute the right of the respondent to enter upon and occupy the land for the purpose of exploring for, developing, and extracting from his land, oils or other substances mentioned in his deed. His claim is that the respondent is in possession of the land for other and different purposes, and is therefore a mere trespasser. This claim is fully substantiated by the evidence, and it is not covered by the former judgment.

Again, it is contended by the respondent that the appellant's cause of action was barred by its adverse possession. But this position is effectually answered by the findings of the

court below. It is directly found by the court that the plaintiff was never ousted of his possession, but that he and the defendant were both in possession, and were both entitled to the possession. It is true that the court found generally that the answer of the defendant, which included the defense of the statute of limitations, was true, but the other finding referred to is inconsistent with and contradictory of this. Besides, both the evidence and the findings show that the defendant made no claim of title to the land as against the plaintiff, and that it never paid any taxes upon it. It merely asserted the right to occupy a part of the land, temporarily, in conjunction with the plaintiff, and not adverse to his claim of ownership, and paid taxes for a part of the time, not on the land, but upon the structures it had placed upon it. A holding without disputing the plaintiff's rights, and without asserting any claim opposed to his rights, could not be adverse to him: Unger v. Mooney, 63 Cal. 595, 49 Am. Rep. 100; Oneto v. Restano, 78 Cal. 377, 20 Pac. 743. Besides, the evidence fails to show that the possession of the defendant was continuous. Its occupation was a part of the land by certain structures erected upon it. The evidence shows that before the statute had run its full time these structures were washed away by high water. It is not shown when they were replaced. But it is shown that, when the structures were rebuilt, they were put up on a different part of the plaintiff's land. As the defendant was a mere trespasser, it could only obtain title to the land actually occupied by it, and as its possession was changed, and neither part of the land was in actual possession by it for the requisite time, there was no bar as to either tract.

As to the claim that the plaintiff is estopped by deed to deny the defendant's right to possession, we find that there is nothing in the deed inconsistent with the plaintiff's claim in the action. The deed was by the appellant and one Hill, and granted, bargained, sold, assigned, and transferred to the respondent all of their right, title, and interest in and to "all the buildings, tanks, derricks, pipes, pipe-lines, fixtures, and all other personal property whatsoever that now is, or are, or ever hereafter has or have been, on or upon any portion of the rancho, known as the 'Ex-Mission of San Buenaventura,' in the county of Ventura, state of California."

This was nothing more than a transfer of an interest in personal property. But counsel for respondent seem to think that, because, at the time the transfer was made, a part of the property was on the lands of the appellant, now in controversy, the appellant is in some way estopped to claim title and possession to his land. But, as we have said, we see nothing in the deed which should estop the appellant from asserting and maintaining his present claim. Judgment and order reversed and cause remanded.

We concur: Sharpstein, J.; McFarland, J.; De Haven, J.; Paterson, J.

MONTGOMERY v. SAYRE.*

No. 13,911; January 4, 1891.

25 Pac. 552.

Jury Trial—Special Findings.—Where the record shows that two special questions were submitted to the jury which they answered, but gave no general verdict, and that these questions did not cover all the issues in the case; that the trial proceeded, and both parties introduced evidence; and that the case was submitted to the "court for decision and judgment," which was rendered against defendant—the right to trial by jury was waived by defendant under Code of Civil Procedure, section 631, providing that jury trial may be waived by oral consent in open court entered in the minutes or by failure to appear at the trial.

Trial—Special Verdict.—Answers to Special Questions not Disposing of all the issues in a case do not constitute a special verdict within Code of Civil Procedure, section 624, defining a special verdict to be that by which the jury find the facts; and such special findings, unaccompanied by a general verdict, are of no effect, since by section 625 the special findings only control when they are inconsistent with the general verdict.

APPEAL from Superior Court, Fresno County; J. B. Campbell, Judge.

Code of Civil Procedure, section 631, provides that the right to trial by jury is waived (1) by failing to appear at the

*For subsequent opinion in bank, see 91 Cal. 206, 27 Pac. 648.

trial; (2) by written consent in person or by attorney, filed with the clerk; (3) by oral consent in open court entered in the minutes.

Geo. A. Nourse for appellant; W. F. Goad and Arthur Rogers for respondent.

THORNTON, J.—This action was on a promissory note executed by defendant's testator to the plaintiff. It was given to secure the payment of the note of the Pioneer Gold Mining Company to the plaintiff for $110,000. This last note was indorsed by William S. Chapman. It was further secured by the pledge of all the shares of the capital stock of the Pioneer Gold Mining Company, except thirty shares thereof, and also by a mortgage on the Pioneer mine, then owned by the company above named, executed by said company. The above facts appear and are not disputed. It further appears that there was a prior mortgage executed by the company on the Pioneer mine, on which a suit for foreclosure was brought, and in this suit the plaintiff, who was one of the defendants therein, filed a cross-complaint, asking that his mortgage be foreclosed. This was done, and an order of sale issued directing the proceeds of the sale of the mine under the decree to be applied first to the payment of the prior mortgage, and the remainder upon the plaintiff's mortgage. At the sale under this decree, the plaintiff became the purchaser of the mortgaged premises for $50,000, of which $10,415 was paid to the owners of the prior mortgage, and the remainder, less costs of sale, was applied on the second debt of plaintiff, adjudged then to amount to $69,426.60. The sheriff's return of sale showed a deficiency due on the second debt to plaintiff, amounting to $61,534.13. The complaint shows payments on the mortgage debt to plaintiff, including the payment made of a portion of the funds of the sale above mentioned, amounting to $98,380.82. Judgment for this deficiency was docketed against the mortgagor company and W. S. Chapman. On this judgment payments were made before the commencement of this action, leaving still due, as averred in this complaint, the sum of $34,551.20. Plaintiff asks judgment on the note sued for, principal and interest thereon, amounting to $17,120.80. The claim of plaintiff on

the note sued on was regularly presented to the defendant's executor, who rejected it. This action was brought on the note to recover the amount above mentioned, to be paid by defendant in due course of administration. It is set up in the answer that the $110,000 note had been fully paid, and denies that any sum remains due and unpaid on it. Other allegations of the complaint were denied. These need not be fully stated. As an affirmative defense, the defendant set up by his answer the following: "That a transcript of the docket of the deficiency judgment docketed against the Pioneer Mining Company and W. S. Chapman (the maker and indorser of the mortgage note) was filed with the recorder of Fresno county in November, 1887, and thus the judgment became a lien upon all the real property of said W. S. Chapman in said Fresno county; (2) that at and before the filing of said transcript, Chapman owned certain real property described, situated in said county, which was held in the name of W. F. Goad, trustee for plaintiff, Montgomery, for further security for debts due Montgomery from Chapman; (3) that the said lien of said judgment was never enforced against said property of said Chapman, but that said Montgomery, Chapman & Goad, after the death of said A. L. Sayre, sold and conveyed by deed to Thomas E. Hughes all said real property for $35,000, paid by Hughes to Montgomery, which was received by Montgomery as payment in full of every debt and obligation due from Chapman to him, except the judgment aforesaid, which then amounted to less than $36,000, and that Montgomery thereupon released said land from the lien of said judgment; (4) that said real estate was then worth $140,000, and if sold at its real value would have realized enough to pay all debts due Montgomery from Chapman, including said deficiency judgment; (5) that said Montgomery released said land from the lien of said judgment, and released said Chapman from the obligation of said judgment without the consent of defendant." The case was tried by a jury on the 28th of April, 1889, who rendered the following verdict:

"Question 1. What was the value, May 15, 1888, of the following lands, viz.: The south half of section 24, section 25, the southeast quarter of section 26 and section 35, all in township 11 south, of range 17 east, from the Mount Diablo

base and meridian; also section 1, and the west half of section 15, in township 12 south, of range 17 east, from said base and meridian? Answer. $136,800. C. C. Harris, Foreman."

"Question 2. Did the plaintiff, A. Montgomery, on or about May 15, 1888, release W. S. Chapman from all liability under the judgment in the complaint herein mentioned? Answer. Yes. C. C. Harris, Foreman."

This verdict, it appears, was in answer to special questions embracing special issues submitted to the jury by the questions above given. There was no other verdict, and no general verdict; nor does it appear that any general verdict was demanded by either party. It appears from the record that the trial proceeded after the return of the verdict, both parties introduced evidence, and on the 24th and 25th of April, 1889, it is stated, "said trial was completed and submitted to the court for decision and judgment, with the privilege to the parties to file briefs herein, which was done." The court subsequently rendered its decision, finding on all the issues in the case, disregarding the verdict, treating it as nonexistent, and, in fact, finding contrary to the answers of the jury on the questions submitted to them, and rendered judgment for plaintiff for a sum of money. The defendant appealed.

The above facts are taken from the record, and on them must the solution of the points in this case be made. Was there any verdict rendered on which judgment could be entered? This is an action at law, and the defenses set up on behalf of defendant were all legal defenses. Payment is certainly a legal defense, and so is the discharge of a surety by releasing his principal, or by surrendering a lien on property sufficient, if sold, to pay the debt for which the surety had obligated himself. We have no doubt of the correctness of these rules. Such is the common law, and it is so prescribed in the Civil Code, sections 2819, 2840. The verdict cannot then be regarded as advisory to the court. The case is not one in equity. It has no such features. All the questions arising on the defenses set up relate to legal defenses. If the facts above mentioned exist, the surety is discharged by operation of law, without the necessity of appealing to a court of equity to obtain such discharge. The fact that the statute requires that the judgment must be entered, payable in due course of administration, does not make this an equity case.

This doctrine applies particularly to actions for the recovery of money, which are almost always actions at law. Certainly such must be the form of the judgment in a recovery on a promissory note. By the statute (Code Civ. Proc., sec. 625), in an action for the recovery of money, a jury may, in their discretion, render either a general or a special verdict. In such a case as the one before us, the court cannot direct the jury to find a special verdict, but it may, in such a case, and in fact in all cases, instruct the jury, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. This finding on the written question must be returned and filed with the clerk, and entered on the minutes of the court. When the special finding of facts on the questions submitted is inconsistent with the general verdict, the special finding controls the general verdict, and the court is bound to give judgment accordingly; that is, in accordance with the special finding. It must be held, nothing appearing to the contrary, that the court instructed the jury in accordance with law; that is, if they found a general verdict, to find on the questions submitted to them. We cannot assume or presume that the court violated the law in failing to direct the jury to find a general verdict in connection with their answers to the questions, unless the record shows it. The record must put the court in the wrong. If it does not, it must be held that the court acted in accord with the rules of law. We must presume, then, that the jury did not obey the instructions of the judge, in failing to find a general verdict, as they were told to find. Either party had the right to have the court direct the jury, when they returned their verdict on the questions submitted, to return a general verdict. This was not done, and it must be held that this right was waived by each party to the action.

What, then, is the effect of the verdict which was rendered? Neither party asked for judgment on the verdict as rendered. If this had been asked by either party, the other party might have objected. The objection, if made, should have been sustained, and the result would have been a mistrial. The court could not, of its own motion, have ordered judgment on the verdict. It was not such a verdict as judgment could have been rendered on, unless by consent of both parties. If judg-

ment had been entered on it by consent, the maxim would apply concensus toleit errorem, and the judgment would be valid. This was not a special verdict. A special verdict is defined by the code as that by which the jury find the facts only, leaving the judgment to the court: Code Civ. Proc., sec. 624. The facts found by the jury are all the facts in issue. On these facts so found the court renders judgment: See Breeze v. Doyle, 19 Cal. 101. When the jury find a special verdict they are not bound to find a general verdict. In this case they might have returned either a special or a general verdict. Either was within their power; and in this they were beyond the control of the court: Code Civ. Proc., sec. 625. The special finding in this case did not dispose of all the issues. It did not dispose of the defense of payment and other issues. In any point of view it was not a special verdict. It was a special finding, regularly to be accompanied by a general verdict. Not being so accompanied, it was of no legal effect, and no judgment, except by consent of the litigants, could have been entered on it. It was a nullity to which no validity could have been imputed, unless the parties had agreed that it should be regarded, so far as it disposed of the issues in the case, as a controlling finding or verdict. On this point see Eisemann v. Swan, 6 Bosw. 668. But the record shows no such agreement. For all that appears the jury was discharged without finding anything which in law can be held as a verdict, and the record informs us that the parties submitted further evidence; that the trial was completed on the 25th of April, 1869 (one day after the so-called verdict was returned into court); and that the cause was, on the 25th of April, "submitted to the court for decision and judgment." The verdict seems to have been treated by counsel and court as of no effect. It appears in the transcript that the cause came on regularly for trial; was tried on the 24th and 25th of April, 1889, when the trial was completed. We cannot construe this otherwise than as a statement, which we must hold to be absolutely true, that the trial was not completed until the twenty-fifth day of April, 1889, the day after the special findings were filed. Certainly the verdict on an incomplete trial is a nullity, and should be so treated, unless it is shown that the parties gave it effect by a stipulation that it should be regarded as of some validity, and how far it

should be so regarded. The defendant had a right to have his cause tried by a jury. This was accorded to him. The jury was called and sworn in the case, and then was discharged without objection, without rendering a verdict. Both parties afterward went on to try the case, introduced further evidence, and submitted the case for decision and judgment. We cannot hold otherwise than that there was a waiver of a trial by jury, just as effectual as if his consent had been given in open court, and entered on the minutes. The minutes show a consent by action in open court, by proceeding with the trial, introducing further evidence after the jury was discharged, and submitting the case for decision and judgment. Such action was inconsistent with any demand or desire for a jury trial, and should be held a waiver, within the provisions of section 631, Code of Civil Procedure.

It is argued that the verdict was not waived. But in our view there was no verdict, and the counsel seems to have so regarded it, or he would have asked for judgment on the verdict. We can put no other construction on the statements in the record of the course that the trial took than that the finding was regarded as no verdict, and that the trial should proceed as if no verdict had been found. No question of waiver arises on the finding, for there was no verdict. It gave the defendant no right, for it conferred none. It cannot be said that the defendant did not waive his right to have judgment entered on the verdict, as the special finding gave no such right to either party. If it had conferred a right to judgment, and the parties had afterward to complete an incomplete trial, the question might arise, although it would be manifestly unjust to hold either party bound by a verdict on an unfinished and incomplete trial. This disposes of all the questions arising in the cause. There was no motion for a new trial. There is no statement or bill of exceptions in the case, nor any motion made in the court below to set aside the judgment on any ground. We find no error in the record, and the judgment must be and is affirmed.

We concur: McFarland, J.; Sharpstein, J.

PEOPLE ex rel. BOARD OF STATE HARBOR COMMISSIONERS v. ROBERTS.*

No. 12,989; January 4, 1891.

25 Pac. 496.

Shipping.—Wharfage Charges Imposed by the Board of Harbor commissioners on the owner of a barge and lighter, which were kept within a slip constructed, repaired, and dredged by the board, are valid, and not in violation of the constitution of the United States, article 1, section 10, which prohibits a state from levying duty on tonnage without the consent of Congress.

Shipping—Wharfage Charges.—Where a Lighter Actually Received the support of a wharf in discharging into and loading from a vessel tied to the wharf, the fact that the vessel lay between the wharf and the lighter, and that the owner of the vessel had paid regular wharfage rates, does not affect the right of the board of harbor commissioners to collect wharfage rates from the owner of the lighter.

Shipping—Wharfage Charges—Discrimination.—While act of March 17, 1880, which amends act of March 15, 1878, so as to exempt vessels engaged solely in domestic commerce from the wharfage tax, to which vessels engaged in interstate commerce still continue subject, may be invalid, in so far as it discriminates against vessels engaged in interstate commerce, yet the board of harbor commissioners, which is the agent of the state, with only such powers as are conferred on it by the legislature, cannot disregard the amendment, and collect wharfage taxes from vessels engaged solely in domestic commerce.

APPEAL from Superior Court, City and County of San Francisco; James G. Maguire, Judge.

Rosenbaum & Scheeline for appellant; T. C. Coogan for respondent.

PATERSON, J.—This action was brought on behalf of the people on relation of the harbor commissioners to recover a certain sum, claimed to be due to plaintiff for wharfage. The defendant's barge and lighter part of the time were attached to the wharves by hawsers and lines fastened to mooring piles, which had been placed there for that purpose by the respondents, and part of the time they were not attached to

*For subsequent opinion in bank, see 92 Cal. 659, 28 Pac. 689.

the wharves, but were fastened by lines to the sides of other vessels, which were moored up against and fastened to the wharves. Appellant contends, first, that his vessels did not use the wharves, and, therefore, the charge is one upon tonnage and in conflict with section 10, article 1, of the constitution of the United States; second, that appellant is exempt from the charge made, because his vessels are engaged in transferring merchandise between different points within the state.

There is no merit, we think, in the first contention. The court found that the appellant did use the wharves, and that finding is not challenged, but it also found that appellant's vessels were not in all cases attached directly to the wharves. The barge and lighter were, however, within the slips which were constructed, kept in repair, and dredged by the respondents; and appellant could not have made use of them unless they had been so repaired and dredged. Under these circumstances, wharfage charges are valid, and the constitutional provision relied upon by appellant is not violated: People v. Gaslight Co., 54 Cal. 248; People v. Williams, 64 Cal. 502, 2 Pac. 393; State Tonnage Tax Cases, 12 Wall. (U. S.) 219, 20 L. Ed. 370; Cannon v. City of New Orleans, 20 Wall. 577, 22 L. Ed. 417; Benedict v. Vanderbilt, 1 Rob. (N. Y.) 194. Furthermore, the barge and lighter were, when within the slips, actually receiving the support of the wharves in discharging into and loading from vessels which were tied thereto. They were practically tied to the wharves, although there was a vessel between them and the wharf itself, and the fact that the owners of the vessels lying next to the wharf had paid regular wharfage rates does not affect the right of the harbor commissioners to collect from the defendant: Vicksburg v. Tobin, 100 U. S. 430, 25 L. Ed. 690.

We are of the opinion that appellant's second contention is sustained by the act of the legislature, approved March 17, 1880, amending section 6 of an act entitled "An act concerning the waterfront of the city and county of San Francisco," approved March 15, 1878. This amendatory act provides that "no wharfage shall be collected on any merchandise or other article loaded on any vessel or railroad car, in the city and county of San Francisco, for the purpose of being transported to any port or place in the state of California, nor on any

merchandise or other article loaded on any vessel or railroad car, at any port or place in the state of California, and arriving in the city and county of San Francisco." It is claimed by respondents that this act is unconstitutional, and they rely upon the decision of the supreme court of the United States, in the case of Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743, in support of this proposition. We do not think that case is in point. It was held in that case that a state could not employ its property for public use so as to hinder, obstruct, or burden, interstate commerce in the interest of commerce wholly internal to that state; could not build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states. In that case an ordinance of the city of Baltimore required vessels laden with the products of other states to pay, for the use of the public wharves of that city, fees which were not exacted from vessels landing thereat with the products of Maryland. It does not follow that because vessels plying between San Francisco and ports outside of this state are exempt from wharfage, under the decision in Guy v. Baltimore, the defendant's vessels should not be exempt therefrom. Application of the rule contended for by respondent, would be a discrimination against domestic vessels. The power to collect wharfage is derived from the legislature, and the board of harbor commissioners is the agent of the state, with such powers, and no others, as are conferred upon it by the legislature. The court found that "both said lighter and said barge were engaged in transporting freight between different points in the state of California." Judgment reversed, with directions to the court below to enter judgment on the findings in favor of the defendant.

We concur: Works, J.; McFarland, J.; Sharpstein, J.

MILLER v. WADDINGHAM et al.*

No. 13,899; January 19, 1891.

25 Pac. 688.

Fixtures.—Houses Built on Mud-sills Resting upon the Soil, which is not disturbed, are affixed to the land within the terms of Civil Code, section 660, declaring that "a thing is deemed to be affixed to the land when it is . . . . permanently resting upon it, as in the case of buildings."

Fixtures.—Such Houses Built by a Contractor for a Vendee in possession, who has paid part of the price for the land, and who, being unable to pay for the houses, turns them over to the contractor, cannot be removed from the freehold by the latter. Distinguishing Hendy v. Dinkerhoff, 57 Cal. 3.

Fixtures.—A Vendee Who has not Paid the Entire Purchase Price cannot claim the right to remove houses built by him on the land on the principle that, since equity regards that as done which ought to be done, he should be deemed the trustee of the purchase money for the vendor, and the equitable owner of the land, with the right to deal with it as he pleases.

Fixtures.—A Vendee Who, While in Possession Under an Executory contract of purchase, has built houses on the land before paying the entire purchase price, may be enjoined by the vendor from removing them.

APPEAL from Superior Court, San Bernardino County.

Waters & Gird for appellant; Harris & Gregg for respondents.

HAYNE, C.—This was a suit for an injunction to restrain the defendants from removing six buildings from the plaintiff's land, and for damages for injuries sustained in that regard. The trial court gave judgment for the defendants, and the plaintiff appeals upon the findings. The findings show the following case: The plaintiff, who was the owner of two blocks of land in "Ontario Colony," and of half of the streets in front thereof, made a contract to sell the land to the defendant's assignor, who entered into possession, and paid the sum of $9.000 "on said contract." While in posses-

*For subsequent opinion in bank, see 90 Cal. 377, 27 Pac. 750.

sion he caused the houses in question to be erected, but, being unable to pay the contractor, he made over the houses to him, and the latter sold them to the defendants, who proceeded to move them. It does not clearly appear whether the houses were erected upon the plaintiff's blocks of land, or upon the streets in front thereof. But the counsel have assumed (what in all probability was the fact) that the houses were upon the blocks mentioned; and, following the lead of counsel, we have so assumed for the purposes of this opinion. "Said houses were built on redwood mud-sills of two-inch by six-inch timber; said mud-sills resting upon the soil. The soil was not disturbed in building or removing said houses. Nothing was ever said about the houses being built so they could be removed." It does not appear what was the price to be paid to the plaintiff for the land. The inference is that only a part of the price was paid. Assuming that such was the case, it does not appear whether the unpaid portion was due at the time of the removal of the houses, or at the commencement of the suit. The vendee is still in possession, and the contract "is subsisting and not disaffirmed."

The first question to be considered is whether the houses were affixed to the land in such a manner as to become a part of the realty. The term "fixture" is used in different senses. Sometimes it is used in its general sense, of a thing which is affixed to land: Merritt v. Judd, 14 Cal. 63, 64. Sometimes it is used to designate a thing which can be severed from land after having been affixed to it. In this sense it is a term "denoting the very reverse of the name": 1 Chit. Gen. Pr., p. 161. Less frequently it is used to designate a thing which cannot be removed after having been affixed to the land: Ewell, Fixt., p. 4, and note. But, whatever may be the true signification of the term, it is manifest that (with certain exceptions, such as heirlooms and the like) the thing must first be affixed to the land, in a legal sense, before any question as to its removal can arise. If not affixed to the land in any sense, its owner may move it about at pleasure. The rule of the common law was that a thing was not to be deemed affixed to land unless fastened to it in some manner. And in Pennybecker v. McDougal, 48 Cal. 160, it was held that a cabin set on wooden blocks not attached to the soil was personal property. But the value of the cabin was only $25, and it

must have been more or less of a temporary structure. In New York and other states the common-law rule was relaxed so as to include things permanently resting upon the soil, though not fastened thereto. Thus, in Snedeker v. Warring, 12 N. Y. 175, it was held that a statute resting upon a pedestal in front of a building was a part of the realty; the court saying: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement." And see Strickland v. Parker, 54 Me. 266; Cavis v. Beckford, 62 N. H. 229, 13 Am. St. Rep. 554. And this principle is embodied in section 660 of the Civil Code, which provides that "a thing is deemed to be affixed to land when it is . . . . imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings." In this case the houses seem to have been of a permanent character (they cost $4,100); and we think that, under the code, they must be considered as having been "affixed" to the land.

This being so, the question arises whether the successors in interest of the vendee had any right to sever the houses from the land. Upon this question many modern authorities lay great stress upon the intention with which the thing was affixed (Vail v. Weaver, 132 Pa. 363, 19 Am. St. Rep. 598, 19 Atl. 138; Walker v. Flouring-mill Co., 70 Wis. 96, 35 N. W. 332; Schaper v. Bibb, 71 Md. 149, 17 Atl. 935; Docking v. Frazell, 38 Kan. 423, 17 Pac. 160); while others say that the intention is of secondary importance: Collamore v. Gillis, 149 Mass. 581, 14 Am. St. Rep. 460, 5 L. R. A. 150, 22 N. E. 46. But, whatever may be the controlling principle, the preponderance of authority is to the effect that a building of a permanent character, erected by a vendee in possession under an executory contract of purchase, is part of the realty, and cannot be removed by him or his successors in interest, in the absence of an agreement to that effect. In Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332, the action was replevin for a house which had been erected by the vendee in possession under a contract of purchase, who, after failing to perform his contract, sold the house to the defendant, who removed it. The court gave judgment for the plaintiff, saying that it could not be presumed that the vendee, when he affixed the house to the soil, had any intention of removing it. In Hemmenway v. Cutler, 51 Me. 407, a question

arose, upon a writ of entry, as to the effect of an omission, from a levy, of a barn erected by a vendee in possession under a bond for a deed. If the barn was real estate, the omission rendered the levy void; otherwise, it was valid. The court held that the levy was void, and Appleton, C. J., delivering the opinion, said: "It is well settled that erections made by a mortgagor, or one occupying land under a bond for a deed, are to be regarded as real estate, and are not removable by the occupant as personal property": See, also, Kingsley v. McFarland, 82 Me. 231, 17 Am. St. Rep. 473, 19 Atl. 442. In Westgate v. Wixon, 128 Mass. 304, the action was for damages for the removal of a barn erected on the plaintiff's land by one Abbott, who was in possession under a bond for a deed. He failed to perform the conditions of the bond, but remained in possession, and the barn was removed by the defendant under a writ issued in a suit by a creditor. It was held that the plaintiff should recover, and the court, per Morton, J., said: "As a general rule, buildings are part of the realty, and belong to the owner of the land on which they stand. Even if built by a person who has no interest in the land, they become a part of realty, unless there is an agreement by the owner of the land, either express, or implied from the relations of the parties, that they shall remain personal property. . . . . The barn in question was a substantial structure. It is clear from the facts agreed upon that Abbott built it, not for any temporary purpose, but for the permanent improvement of the land, which he expected to become his property according to the terms of the bond. When built, it became a part of the realty, and inured to the benefit of the plaintiff as additional security for the performance of the condition of the bond. Abbott had no right to remove it, and his creditors had no right to attach it as his personal property." The foregoing were cases at law. The same rule is applied in equity. In English v. Foote, 8 Smedes & M. (Miss.) 444, the suit was to foreclose a mechanic's lien for work upon a house erected by a vendee in possession under a contract of purchase which he failed to perform. It was held that, under the statute in force in that jurisdiction, the lien extended only to the interest of the person who caused the house to be erected, and that the vendee had no interest in the house after it was affixed to the land. The court, per Clayton, J., said: "As a general

rule, whatever is annexed to the freehold becomes a part of it, and cannot be severed from it. There are many exceptions to the rule, but it applies with all its strictness between vendor and vendee." In McLaughlin v. Nash, 14 Allen, 136, 92 Am. Dec. 741, the suit was for an accounting after dissolution of partnership. Before the formation of the partnership the plaintiff was in possession under a bond for a deed, and had affixed certain articles to a building which was upon the land. When the partnership was formed, the defendant purchased an interest in the articles mentioned. The plaintiff failed to perform the condition of the bond, and after the dissolution of the partnership the owner leased the premises to the defendant. It was held that such of the articles as had been permanently affixed to the building were part of the realty, and the court, per Gray, J., said: "The plaintiff had not the same right to remove fixtures annexed by him to the land so occupied by him without paying rent to the owner, under a contract for its purchase, as an ordinary tenant would have against his landlord. . . . . His rights in this respect were no greater than those of a vendor or mortgagor against his vendee or mortgagee": See, also, Allen v. Mitchell, 13 Tex. 373. The rule between vendor and vendee to which the court refers in the passage last quoted is that in relation to things affixed by the vendor before the contract of purchase, or before a conveyance, if there is no contract, in which case the construction leans in favor of the vendee: Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251. The decisions above quoted are in relation to things affixed by the vendee after the contract of purchase.

It is to be observed that the case before us is to be distinguished from that of erections by a person in possession under a revocable license. The rule as to licenses was laid down in Little v. Willford, 31 Minn. 178, 17 N. W. 282. But the court was careful to say: "A distinction is to be noted between a license and a contract for the purchase of land under which buildings are erected. In the latter case the builder's rights are determined by the nature of his contract, and upon his default the fixtures go with the land." The same distinction is stated by Cooley (Cooley on Torts, sec. 429); and, as to the general rule, see 1 Washburn on Real Property, 5th ed., p. 7. In most of the cases above cited, the vendee, after making the erections, failed to perform his con-

tract. But, so far as the question of fixtures is concerned, this circumstance is not material. If a building be once affixed to land so as to become a part of the realty, it does not change its character by subsequent nonaction on the part of the person who affixed it. The case of Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107, is not in conflict with the above decision. There the thing affixed to the realty did not belong to the person who affixed it. Such person, therefore, had no right, as against the owner of the thing, to make it a part of the realty; and the decision was that the owner of the realty stood in the shoes of the person who did the affixing, and had no greater rights than the latter had. It is true that in the case before us the houses were affixed to the land by a contractor; but he affixed them under a contract with the vendee, and for his benefit, and of course must be taken to have consented to the affixing, and to all its consequences. It results that the houses were part of the realty, and that the vendee had no greater right to them than to any other part of the property.

The defendants, however, advance two arguments, which apply not merely to the fixtures, but to the whole property. In the first place, they invoke the maxim that equity regards that as done which in good conscience ought to be done, and argue that after the contract the vendee was the trustee of the purchase money, and the owner in equity of the land, and could deal with it as he saw fit. As above stated, this argument has no reference to fixtures as distinguished from the land itself, but applies to the whole property. Nor does it depend upon whether the vendor has permitted the vendee to take possession before performance; for, under the rule relied upon, the vendee is as much the equitable owner where he has not taken possession as where he has. Nor does the argument depend upon whether the unpaid purchase money is due or not; for, by the terms of the rule, it applies as soon as the contract is made. If the argument is good at all, it requires that, as soon as a contract of purchase is made, the vendee should in every case be entitled to enter upon the enjoyment of the property, and be allowed to deal with it as he sees fit. But this is certainly not the law. The maxim referred to is not of universal application: 1 Story's Equity Jurisprudence, sec. 64g. It was established by courts of equity to attain equitable ends, and it will not be applied to accomplish re-

sults which are inequitable; as, for example, to enable a vendee to waste or destroy the property before the performance of his contract. Before such performance, whatever interest he has is subject to be devested upon nonperformance; for in case of nonperformance the vendor is not compelled to foreclose a lien upon the property, but may rescind or retake possession: Hannan v. McNickle, 82 Cal. 126, 23 Pac. 271; Connolly v. Hingley, 82 Cal. 643, 23 Pac. 273; Hoffman v. Remnant, 72 Cal. 1, 12 Pac. 804; Troy v. Clarke, 30 Cal. 419. The interest of the vendee must therefore be conditional. Non constat that he will be able to perform the condition when the time for the performance arrives; and a court of equity will not take his performance for granted to such an extent as to allow him to waste or destroy the property. Nor does it make any difference that the vendor has permitted him to take possession. Such permission does not carry with it a right to waste or destroy the property in the case of a vendee any more than it does in the case of a tenant. The question involved was decided in the case of Crockford v. Alexander, 15 Ves. 138, in which Lord Eldon enjoined a vendee in possession from cutting timber, although he admitted that the vendee was, in equity, the owner of the estate. The case would be different if the vendee had performed all the conditions of his contract. In such case he would be the absolute owner of the equitable estate, and the vendor would have merely the dry legal title, which he would be compelled to transfer when required, and which he would not in the meantime be allowed to use in opposition to the interests or wishes of the vendee. But this would not be by reason of any presumed or supposititious performance by the vendee, but because he had actually performed. As above stated, the record does not show clearly whether the vendee has paid all the purchase money or not; but the inference from what is stated, and from the argument of counsel, is that he has not. And, as the defense is based upon an equity in opposition to the legal title, it was incumbent upon the defendants to make the fact appear: Arguello v. Bours, 67 Cal. 450, 8 Pac. 49.

In the next place, it is contended that the position of a vendor after an executory contract of purchase is analogous to that of a mortgagee; and that the rule that a mortgagee cannot have an injunction against the removal of a portion of

the mortgaged premises, without showing that his security would thereby be impaired, applies here. This is but a variation of the preceding point. It is, in substance, saying that the vendee will be allowed to waste and destroy the property unless it be shown that the vendor's lien will thereby be impaired; and it depends upon the proposition that the position of the vendor is like that of a mortgagee. There are some respects in which the analogy holds; more especially in the case of a common-law mortgage, where the mortgagee has the legal title. But the likeness is by no means perfect. The vendor has not a mere lien for the security of money, which he must foreclose upon nonperformance by the vendee. As shown by the cases cited under the preceding head, he may, upon such nonperformance, rescind the contract and retake possession. He has therefore, in addition to the legal title, a reversionary interest in the equitable estate, conditional upon nonperformance by the vendee, which interest will be protected in equity. The vendee on his side has, before performance, only a conditional equitable interest for equitable purposes; and, as above stated, a court of equity will not take his performance for granted to such an extent as to enable him to grasp at once at the enjoyment of the property.

It results that the judgment is not sustained by the findings; but, in the somewhat uncertain condition of the record, we do not think that final judgment should be ordered for the plaintiff. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for a new trial.

In re TILDEN.

No. 20,776; January 19, 1891.

25 Pac. 687.

Attorneys—Disbarment—Accusation of Larceny.—Under Code of Civil Procedure, section 287, providing that an attorney may be disbarred for the reason, among others, that he has been convicted of a crime involving moral turpitude, the supreme court has no authority to proceed against a member of the bar upon a mere verified accusation of larceny, preferred by another attorney.[1]

Application to disbar an attorney.

Crittenden Thornton for petitioner; T. C. Coogan for respondent.

BEATTY, C. J.—This is a proceeding against an attorney and counselor of this court, for the purpose of causing his name to be stricken from the roll. It is founded upon a verified accusation, of which the following is a copy:

"Now comes Charles F. Hanlon, an attorney and counselor of this court, and brings this accusation against Charles L. Tilden, and for causes of accusation states that said Charles L. Tilden was at all the dates and times hereinafter mentioned, and now is, an attorney and counselor of this court; that heretofore, to wit, the fifth day of December, 1890, at the city and county of San Francisco, state of California, the said Charles L. Tilden did steal, take, and carry away from the office and possession of this accuser, and by force and arms, and without the consent of this accuser, a certain valuable paper and undertaking for the payment of money, that is to say, a certain undertaking of the firm of Tilden & Tilden, of which the said Charles L. Tilden is a member, for the payment unto said Charles F. Hanlon, as attorney for the plaintiffs in the action hereinafter men-

[1] **Cited** with approval in Ex parte Tyler, 107 Cal. 81, 40 Pac. 34, where it is held that an attorney offending in his individual capacity only is not subject to disbarment proceedings until after conviction for the offense.

Cited in Matter of Danford, 157 Cal. 428, 108 Pac. 323, holding disbarment not precluded in advance of termination of criminal prosecution for obtaining money under false pretenses.

tioned, for the sum of $150 to be paid as penalty costs upon the consent of said Charles F. Hanlon, as attorney for plaintiffs, to a continuance of the argument of a certain demurrer in an action then pending in the superior court of the city and county of San Francisco, state of California, in which William H. Carpenter, Harry S. Carpenter, and Thomas Carpenter were plaintiffs, and O. M. Schaff, M. L. Wilbert, William S. Arnold, and M. M. Donovan were defendants; 'that said Charles L. Tilden did so with the felonious intent to steal, take, and carry away from the office and possession of said plaintiffs' attorney the said paper and undertaking.

" 'CHARLES F. HANLON.' "

Upon the filing of this accusation, Mr. Tilden was cited to answer it, and in response to the citation he files an answer denying the truth of the charge, and at the same time objects to its legal sufficiency. His objection is well taken. The accusation is somewhat ambiguous, charging a larceny in terms, but describing the act in such manner as to leave it doubtful if anything more than a trespass is alleged. Assuming, however, that a larceny is charged, this court has no jurisdiction to try an accusation of that character, and it is not until after an attorney has been tried and convicted of a crime involving moral turpitude, and the record of his conviction produced here, that we are expressly empowered to remove or suspend him for that cause: Code Civ. Proc., sec. 287. But it is contended that in such matters this court must necessarily have an authority more extensive than the mere letter of the statute, and to enforce this view the case is supposed of an attorney notoriously guilty of an infamous crime, but acquitted of the charge through some scandalous miscarriage of justice. It is sufficient on this point to say that no such case is before us, and that it will be time enough to decide it when it arises. Even conceding that in the case supposed it might be our duty to proceed against an attorney in spite of his acquittal, we are very certain that it is no part of our duty to anticipate the action of the proper trial court where the attorney has not even been accused. Mr. Tilden's demurrer is sustained and the proceeding dismissed.

We concur: Paterson, J.; Garoutte, J.; De Haven, J.; Harrison, J.; Sharpstein, J.; McFarland, J.

HEWETT v. DEAN et al.*

No. 14,011; January 30, 1891.

25 Pac. 753.

Promissory Note—Default in Interest—Demand.—Where a note secured by mortgage declares that, on failure to pay the annual interest when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder, demand after default is not necessary to support an action for the entire sum. Bringing the suit to foreclose is sufficient demand.[1]

Promissory Note—Default in Interest.—A Delay of Three Months after default in the interest is not a waiver of the right to exercise the option, when the delay is caused by reason of defendant's request to be allowed a few days additional in which to pay the interest.

Mortgage—Payment of Taxes.—A Mortgage, Given to Secure a contemporaneous note bearing twelve and one-half per cent interest, provided that "all payments made by the mortgagee for taxes and assessments on said premises, excepting taxes on the interest of the mortgagee therein," might be included in the decree of foreclosure. The mortgagee signed a separate agreement to credit the mortgagor with two and one-half per cent interest on the note if the latter presented receipts showing that he had paid "all taxes against the property covered by the mortgage." Held, that this was not an agreement by the mortgagor to pay taxes on the money loaned, nor could parol evidence be given that such was the intention, for the purpose of avoiding the entire interest, under constitution, article 13, section 5, declaring any contract by which a debtor agrees to pay taxes on the money loaned shall be void as to any interest specified therein.

Mortgage—Attorney Fees.—The Note Provided that, if suit was commenced to enforce its payment, the maker would pay five per cent on the principal as an attorney's fee, and the mortgage provided for the payment of "a reasonable counsel fee" upon foreclosure. The complaint alleged "that the sum of $300 is a reasonable attorney's fee or counsel fee for the foreclosure of said mortgage." Held, that this was sufficient to support a judgment for an attorney's fee with-

*For subsequent opinions in bank, see 91 Cal. 5, 25 Pac. 753; 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93.

[1] **Cited** and followed in Dieter v. Bowers, 37 Tex. Civ. App. 618, 84 S. W. 849, a foreclosure of a deed of trust.

out averring that plaintiff had actually incurred expense for that purpose. But plaintiff was not entitled to recover as counsel fee more than five per cent on the principal, as provided in the note.[1]

APPEAL from Superior Court, Orange County; J. W. Towner, Judge.

Victor Montgomery for appellants; Ray Billingsley for respondent.

BELCHER, C. C.—This is an action to foreclose a mortgage on real property. The note, to secure which the mortgage was given, was for $2,500, dated October 29, 1887, and payable three years after date, with interest at the rate of twelve and one-half per cent per annum payable annually, and if not so paid to be compounded annually, and bear the same rate of interest as the principal. The note then contained the following provisions: "And should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Should suit be commenced to enforce the payment of this note, we agree to pay an additional sum of five per cent on principal as attorney's fees in such suit." The mortgage also provided: "And the mortgagors promise to pay said note according to the terms and conditions thereof, and in case of default in payment of same, or of any installment of the interest thereon when due, the mortgagee may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee, to be fixed by the court." The action was commenced on the eighteenth day of January, 1889, and the complaint alleged that no part of

[1] Cited with approval in Lewis v. Sutton, 21 Idaho, 545, 122 Pac. 913, where the court says that to get at the figures of the attorneys' fees for foreclosure intended by the parties to a mortgage contract, "the notes and mortgage should be read and construed together."

Cited and followed in Lewis v. Sutton, 21 Idaho, 245, 122 Pac. 913. It was said there: "The parties have power to stipulate a fee which is lower than a reasonable fee, but the court should not fix or allow a fee, although stipulated, which is unreasonable or extortionate. We think this construction of the stipulation found in the notes and the mortgage is fully sustained by the authorities, and that the provisions with reference to attorneys' fees found in the notes and mortgage should be read and construed together."

the principal or interest mentioned in the note had been paid; and "that because of said interest not having been paid when due, and upon the provision with reference thereto contained in said note, the plaintiff elects to consider and declare the whole sum of principal and interest of said note now due and payable." The prayer was that the plaintiff have judgment for the sum named in the note as principal, and interest thereon as the note specified, compounded annually, "and for five per cent on the said principal sum of $2,500, for attorney's fees, as provided in said promissory note, and being such reasonable counsel fee, as provided in said mortgage, and for costs of suit," and also that the usual decree of foreclosure be entered. Subsequently the plaintiff filed an amendment to his complaint, alleging that on or about the 20th of November, 1888, he demanded personally of the defendant G. L. Dean the payment of the whole sum of principal and interest; and on the 4th of December, 1889, he filed a supplemental complaint, alleging that on the 29th of October of that year another installment of interest fell due, and that no payment whatever of interest or principal had been made. The defendants demurred generally and specially to the complaint as amended, and the demurrer was overruled. They then answered, and by their answer denied that plaintiff made any demand for the payment of the principal of the note prior to the commencement of the action, and alleged that no notice of plaintiff's election or option to consider the principal and interest of the note due was ever given by him to them, or either of them, prior to the commencement of the action. They also set up a written memorandum, signed by the plaintiff, agreeing to credit the defendants with two and one-half per cent of the twelve and one-half per cent stipulated interest, provided the defendants should present receipts showing the payment of all taxes against the property covered by the mortgage on or before the fifteenth day of December of each year, and alleged that the memorandum was made at the time the note and mortgage were executed, and was a part of the transaction, and that they had paid all state, county, and municipal taxes assessed against the property, and were therefore entitled to a credit of the two and one-half per cent per annum on the interest. The case was tried, and the court found that the plaintiff signed and de-

livered to the defendant G. L. Dean the memorandum set forth in the answer, at the time the note and mortgage were executed; that an agreement was thereby made between the plaintiff and defendants that the rate of interest on the note should be ten per cent per annum only, provided the defendants should pay all taxes levied against the mortgaged property subsequently; that the defendants paid the state, county and municipal taxes on the property for the fiscal year 1888–89, and the municipal taxes for the fiscal year 1889–90, but had not paid the state and county taxes for the last-named year, and were entitled to a reduction of the interest on the principal to ten per cent per annum for the first year only; that the plaintiff had paid all state, county, and municipal taxes assessed against the mortgage; that no part of the principal sum nor of the interest thereon mentioned in the note and mortgage had been paid; that no notice that plaintiff had elected, or exercised his option to consider the principal and interest of the note due was given by plaintiff to defendants, or either of them, prior to the commencement of the action, and that no demand was made by plaintiff upon defendants for the payment of the whole sum of principal and interest other than by bringing the suit; that the sum of $300 is such reasonable attorney's fee as is provided in the note and mortgage; and that at the time of the trial, December 21, 1889, the amount of principal and interest due and unpaid on the note was $3,149.60. A decree of foreclosure was accordingly entered, adjudging that there be paid to the plaintiff from the proceeds of the sale of the property the amount found due, and $300 for attorney's fee, and costs of suit. The defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

1. The appellants contend that it was necessary for respondent, before commencing his action, to give them notice that he had exercised his option to treat the whole sum of principal and interest as due, and to make demand for the payment of the whole sum, and also that, by his delay to commence the action for nearly three months after the first installment of interest became due, he waived the right to exercise such option. The promise to pay the interest annually was absolute, and the first installment became due at the expiration of one year after the date of the note. The stipulation in

the note that, if the interest should not be paid when due, then the whole sum of principal and interest should immediately become due and payable at the option of the holder, was without any conditions or limitations requiring notice or demand. The makers knew of this provision, and their failure to pay the interest when it became due left it wholly optional with the holder to insist upon the payment of the whole debt, or not, as he might elect. In Whitcher v. Webb, 44 Cal. 127, where the note in suit contained a provision similar to that involved here, it was held that a failure to pay the interest when it became due made the whole amount of the note due absolutely, at the option of the holder, without any notice from the holder to the payor. The court said: "The plaintiff had no duty to perform to the defendant, and the latter no excuse to delay the payments which he had stipulated to make." In Dean v. Applegarth, 65 Cal. 391, 4 Pac. 375, the note in suit bore interest at the rate of one per cent per month, payable monthly, in advance, and it was stipulated that, in case default should be made in the payment of any of the interest when due, such installment or payment thus in default should bear interest from the day of maturity until payment at the rate of two per cent, compounding monthly, and at any time during such default the entire unpaid balance of the principal sum should, at the option of the holder of the note, and not otherwise, become due and payable, and the principal sum so due and payable should bear interest thereafter at the rate of two per cent per month, compounding monthly, until paid. When the action was commenced, the note, by its terms, had become due, and the question was as to what interest the plaintiff was entitled to recover. The court said: "This provision as to the compounding of the interest on the principal sum was only intended to have operation when, after default in the payment of an installment of interest, and before the principal sum had matured, the plaintiff elected to have the principal become due, so that he might bring his action at once to foreclose." It did not appear from any averment in the complaint or otherwise that any option was made or manifested in any way by the plaintiff prior to the commencement of the action; and it was held that this option must have been exercised and manifested in some way before it could have effect. The court

then, speaking of the ways in which the option might have been manifested, said: "He [the plaintiff] might have brought his action to foreclose immediately on default, and this would have been a sufficient election." In Insurance Co. v. Shepardson, 77 Cal. 345, 19 Pac. 583, the court said: "The promise to pay the interest annually was absolute. The only question left to the option of the holder was whether, upon the failure to pay such interest, the whole amount of principal and interest should immediately become due and payable, without any act on the part of the holder showing his election to exercise the option given him. The case as presented does not call for a decision of this question, but we think the case of Whitcher v. Webb, 44 Cal. 127, determines it adversely to the appellant." As to demand, the general and well-settled rule is that, in an action to recover money payable on demand, or at a fixed time, or on the happening of an event, it is not necessary to show actual demand before bringing suit. The institution of the suit is a sufficient demand: Ziel v. Dukes, 12 Cal. 479; Halleck v. Moss, 22 Cal. 266; Luckhart v. Ogden, 30 Cal. 556; Cummings v. Howard, 63 Cal. 503.

In the light of the foregoing authorities, it is clear, we think, that the plaintiff could maintain his action without showing notice of his election or demand of payment prior to, or otherwise than by, the institution of his suit. In Crossmore v. Page, 73 Cal. 213, 2 Am. St. Rep. 789, 14 Pac. 787, it was held that an option given to the holder of a promissory note, to have the same become due immediately upon default in the payment of the interest as therein provided, in order to be available as against an indorser, must be exercised within a reasonable time after default, and that a delay of seven months before attempting to exercise the option was unreasonable.

The delay in commencing this action was, as we have seen, less than three months after the default in paying interest, and the circumstances connected with and accounting for the delay are as follows: The plaintiff testified that on or about October 20, 1888, he met the defendant G. L. Dean, and that "Mr. Dean said to me he wanted I should have this money, but he said, 'I have use for it, and if you can just let me have a few days'—or something like that—'I want it to pay for

a carload of material.' I told him, 'Mr. Dean, I am expecting it. I have counted on it, and want the money, but I can get along for a few days.' We was speaking about the interest, and that was a little before the interest became due. I wanted the money, but I didn't propose to press him." The defendant G. L. Dean testified substantially to the same effect, but fixed the time as about October 27th. He stated that plaintiff told him he had use for the money, but under the circumstances he would extend the time to pay the interest, and would not push him. The defendants also put in evidence a letter, dated October 27, 1888, which was written by plaintiff's attorneys, and addressed to and received by defendants, stating that the interest on their note, due the 29th instant, was payable at the attorney's office, where the note would be found, and that prompt payment was expected. It thus appears that the delay complained of was at the request of defendants. Under this showing we do not think it can be said that plaintiff's delay to institute his action was for an unreasonaable length of time, or that he thereby waived his right to exercise the option given him.

2. The point is made that the words "all taxes against the property covered by the mortgage," as used in the memorandum set up in the answer, included taxes upon the mortgage as well as upon the land; and, if so, it is argued that the memorandum, under the provisions of section 5 of article 13 of the constitution, rendered null and void the promise in the note to pay any interest. At the trial counsel for defendants offered to prove that the words above quoted were intended by the parties, and understood by them to cover and include the mortgage tax. On objection, the offered evidence was excluded, and this ruling is assigned as error. We see no error in the ruling. The section of the constitution cited reads as follows: "Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." The promise in the note to pay interest at twelve and one-half per cent was absolute; and the mortgage provided that the mortgagee might include in a decree of foreclosure "all payments made by the mortgagee for taxes and assessments on said premises, excepting

taxes on the interest of the mortgagee therein." The memorandum was not signed by the defendants, and they did not thereby obligate themselves to pay any taxes on the land or mortgage. It simply provided that, if they should present receipts showing the payment of all taxes against the property, then the interest on their note was to be ten per cent per annum only. They might or might not pay all or any of the taxes at their pleasure, and the evidence showed that the plaintiff in fact paid all taxes assessed against his mortgage at the time they became due: See Marye v. Hart, 76 Cal. 291, 18 Pac. 325.

3. It is contended that the court erred in finding that $300 was a reasonable attorney's fee, and in allowing the plaintiff that amount. This is rested upon the fact that there was no allegation in the complaint that the plaintiff had paid that sum, or incurred any liability to pay it, and hence it is claimed that the finding was outside of the issues, and not authorized. But the complaint alleged "that the sum of $300 is a reasonable attorney's fee or counsel fee for the foreclosure of said mortgage"; and, if any averment as to the fee was necessary, this certainly was sufficient: See Carriere v. Minturn, 5 Cal. 435; Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514; Rapp v. Gold Co., 74 Cal. 532, 16 Pac. 325; White v. Alatt, 87 Cal. 245, 25 Pac. 421. The cases cited and relied upon by appellants are not in point. In Patterson v. Donner, 48 Cal. 369, the action was commenced and prosecuted by the plaintiff personally; and in Bank v. Treadwell, 55 Cal. 379, the attorney for plaintiff was employed by it to perform its legal business under a regular monthly salary, and it had neither paid nor become liable to pay to him anything as counsel fees. It was held in each case that, under the circumstances shown, counsel fees could not be allowed; the court, in the latter case, saying: "The object of the law allowing counsel fees is not to afford an opportunity, under cover of the name, for a speculation on the part of the creditor, but to reimburse him in a proper amount for a sum which he pays, or becomes liable to pay, or to relieve him of the burden of paying counsel fees." No such circumstances appear here.

But, even if the plaintiff was entitled to a counsel fee, it is strenuously urged that the amount allowed was too large; that the court could properly allow only $125. This position,

we think, should be sustained. The note provided for an attorney's fee of five per cent on the principal in case an action should be commenced to enforce its payment. The mortgage provided for a reasonable attorney's fee in case of foreclosure. There papers should be read together as constituting one contract in this regard: Civ. Code, sec. 1642. And, besides, the plaintiff asked for only "five per cent on the said principal sum of $2,500 for attorney's fees." It has been held that, when the mortgage fixes the amount of the attorney's fee, it is error for the court to allow a larger sum than that so fixed; Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514. We think that rule should be applied here.

We find no other error in the record. The findings seem to be sufficient and without conflict. We therefore advise that the judgment be modified by reducing the amount allowed for attorney's fees to $125, and that as so modified the judgment and order be affirmed, the appellants to recover costs on appeal.

We concur: Vanclief, C.; Hayne, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is modified by reducing the amount allowed for attorney's fees to $125, and as so modified the judgment and order are affirmed, the appellants to recover costs on appeal.

BURKE v. BOURS et al.*

No. 13,912; March 9, 1891.

26 Pac. 102.

Agency—Purchase of Principal's Land by Agent.—An agent, having charge of certain property for an absent firm, was directed to sell it for about $5,000, and, wishing to purchase for himself, reported his acceptance, subject to approval, of an offer of $4,500 net, and sent a deed of the property with the grantee's name omitted. The owner executed the deed, and, returning it to the agent through the firm, accepted the agent's check for $4,500, which was the full

*For subsequent opinion in bank, see 92 Cal. 108, 28 Pac. 57.

value of the land. The agent did not understand himself to be in the owner's employ, nor that a selling agent's name could not be written in a deed as grantee without the grantor's consent, but, intending no fraud, entered into possession. Held, that the heirs of the grantor could not set up fraudulent concealment as a ground for ejectment. In any event, the grantee's possession could not be attacked without tendering back the purchase money.[1]

APPEAL from Superior Court, San Joaquin County; J. G. Swinnerton, Judge.

George D. Collins for appellant; Jas. H. Budd for respondent.

FOOTE, C.—This action in ejectment was instituted to recover certain real property in the city of Stockton. The cause has been here before (67 Cal. 447, 8 Pac. 49), and it was then decided, among other things, that a certain deed made by one Arguello (whose wife's administrator is now the plaintiff here) to Bours, the defendant, was void and of no effect to convey title from Arguello, because at the time it was executed and acknowledged the name of Bours, the intending purchaser, was not inserted in the deed, and that instrument was a blank as to any grantee. The defendant in possession set up, in defense to the apparent legal title of the plaintiff, facts which were claimed to constitute a perfect equitable title in the former. The court below, by its findings and decision, coincided with the defendant, and rendered judgment that the plaintiff take nothing by his action, and that the defendant recover costs. From that judgment this appeal is taken upon the judgment-roll, and a bill of exceptions showing such of the evidence as is necessary, upon which is based the findings and decision which are attacked. It seems to be conceded by all the contestants that the property in dispute was owned and held by Jose Arguello at the time he signed the deed. The respondents claim, however, that on the fourteenth day of September, 1876, Arguello agreed to, and did afterward, sell and convey the property to defendant Bours, on the fifteenth day of September, 1876. The appellant takes the position that no sale or conveyance ever took place; that the deed made

[1] **Cited** in the note in Ann. Cas. 1912A, 1176, on the validity of sales by agent to himself.

in blank, as to the grantee therein, by Arguello, was void; and that there was no agreement or contract on the part of Arguello to sell to the defendant Bours, and that he never did sell to him.

The basis on which the appellant argues his theory of the case is that Bours was the agent of Arguello to find a purchaser for the property in dispute; that he informed Arguello that he had found a purchaser at the price Arguello was willing to take for the property, but that he did not inform Arguello that he, the agent, was the purchaser, and therefore both the deed and the attempted purchase of Bours was void; that the court below was in error in finding, against the evidence, that Bours was not the agent of Arguello, as also in other findings respecting the "material facts of agency and notice to the principal." The facts, as disclosed by the letters in evidence, appear to be about these: Arguello was the owner of this property on the 19th of August, 1876. Bours never knew him at all, but Falkner, Bell & Co., of San Francisco, seem to have been the agents for Arguello in the collection of rents and general management of the property here involved. Upon that day they wrote to Bours, who lived at Stockton, in which place the property, as we have seen, was situated, that Arguello thought of selling his real estate in that town, and had requested them to ascertain the price it would probably realize. At that time, according to the evidence of Bours, which is not contradicted, he was looking after the property at the instance and request and as the agent of Falkner, Bell & Co., "and for nobody else," as he had been doing before Arguello purchased it for one Mazes, the seller to Arguello. After Bours took charge of the property for Mazes he was instructed by him to make his returns to Falkner, Bell & Co. After Mazes sold to Arguello, Falkner, Bell & Co. sent the deed, showing that sale, to Bours, that it might be recorded and returned to them. After that he looked after the property for Falkner, Bell & Co., who instructed him to take charge of it, pay the taxes, and make returns to them. But he never received any instructions from Arguello respecting the property, or had any communication by word or letter with him. In this state of affairs, Bours replied by letter to this inquiry of Falkner, Bell & Co., that he did not think the property would sell for over $5,000; that the tenant of it was dissatis-

fied with the present rents, which he, however, declined reducing. Falkner, Bell & Co. sent this letter of Bours to Arguello, at Santa Clara. Several days after that the latter wrote to Falkner, Bell & Co. that he agreed with Bours in his opinion of the property, and requested them "to communicate with Mr. Bours, and try to sell the property at a price as near as possible to $5,000." This letter was sent to Bours by Falkner, Bell & Co., stating that it authorized the sale of Arguello's property "at or about your figures, namely, $5,000." Bours replied to Falkner, Bell & Co.'s letter, stating that he had ordered an abstract of title to the property to be prepared, and had "placed the same in the hands of a competent broker," and hoped soon to report a sale of it. Bours testified in this connection that Mr. Cutting, the broker in whose hands he had placed the property, had been in the real estate business for about twenty-five years, etc. Cutting testified that he tried for several weeks to sell the property, but could not. The purport of the letter of Bours just mentioned was communicated by letter to Arguello by Falkner, Bell & Co. At or about this time Bours wrote to Falkner, Bell & Co. that the only offer he had received for the property, free of broker's commissions or costs of deed, was $4,500, "which offer I have accepted, subject to the approval of the owner." He inclosed in that letter a deed for signature, with name of purchaser and amount blank. The letter of Bours was sent to Arguello by Falkner, Bell & Co., with the deed for Arguello's signature, should he approve of the terms mentioned. Falkner, Bell & Co. declined to advise as to the matter, because they knew nothing of the value of the real estate, but stated that they considered Bours a competent and reliable man. Closing, they wrote: "It remains for you to decide as to the price." Falkner, Bell & Co., after receiving the deed signed and acknowledged by Arguello, with the blank filled in by him as to the amount of the purchase price, $4,500, but the name of the grantee omitted, sent the instrument to Bours, with a letter requesting, "Please advise us when the matter is settled." After that Bours sent to Falkner, Bell & Co. a check for the amount of balance due for rents, etc., and also a check for the $4,500, "proceeds of the sale of the property, but did not state who was the purchaser of the property." Falkner, Bell & Co. acknowledged the receipt of the checks, and stated

that they had placed them to the account of Arguello. They informed Arguello of these facts by letter also. Arguello acknowledged receipt of this letter, and appeared to approve of their acts in receiving the money and putting it to his credit. About two months after this it seems that Arguello died, and about two years and eleven months after that this action was brought.

The administration of the estate of Arguello was closed, and the estate distributed, but the money paid by Bours to Falkner, Bell & Co. placed to the credit of Arguello, and known and approved by him to have been received and placed there, has never been returned, or offered to be returned, to Bours. He went into possession as soon as he got the deed, and paid his money. The evidence shows that he paid all the property was worth; that he had no intention of committing any fraud whatever. The most that can be said is that he did not understand that the law would not authorize him, as he did, to have his name inserted by one Inglis, a clerk, in the blank deed, and that he did not understand if he was really the agent of Arguello; that he could not be agent and purchaser without Arguello knowing it, or unless afterward, when informed of the real facts, Arguello made no objection. It is plain that what Arguello wanted was to obtain his price for the property, and that he would not have objected to Bours as a purchaser at a fair price. It is manifest from the letters, and from the acts of Arguello in signing, acknowledging, and filling in the deed with the purchase price, and the acceptance of the money after it was sent by Bours to Falkner, Bell & Co., and placed to Arguello's credit, that the latter agreed to sell this property for $4,500 to anyone who would pay that amount of money for it. It further appears from the evidence that this amount of money was the full and fair value of the property; and that the agreement made by Arguello to sell this property for the sum of $4,500, to anyone who would pay that amount for it, was partially performed by Bours paying the money therefor, and entering into possession thereof. Conceding that Bours was Arguello's agent, and had no right to sell to himself, the evidence tends to show that Arguello knew, after he received the money by the check of Bours, that the purchaser who had gone into possession was Bours, and that Arguello did not object, but ratified his agreement to sell after

the disclosure of the name of the intended purchaser, who was Bours, his agent. This being the case, and the sum paid having been the full and fair price for the land, the contract is not open to objection on the ground of fraudulent concealment. Certainly it could not be avoided by Arguello or his heirs, unless they return or offer to return the money paid, which they have not done. We therefore advise the judgment be affirmed.

We concur: Hayne, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

McCOY v. SOUTHERN PAC. CO.*

No. 14,091; May 20, 1891.

26 Pac. 629.

Railroads—Stock-killing.—The Fact That a Herder, after having rounded up his sheep a mile and a quarter from a railroad track, and after some of them have lain down as if for the night, takes his dog and goes home, is not such contributory negligence as will relieve the railroad company from liability if the sheep afterward stray on the track and are negligently killed; and the admission of incompetent evidence as to the custom of rounding up and herding sheep is not prejudicial to the company.

Railroads—Stock-killing—Fence.—In an Action Against a Railroad Company for negligently killing stock, an allegation that the damage was caused by defendant's failure to maintain a good and sufficient fence will include any defect in the fence without more particular reference to it.

Railroads—Stock-killing—Fence.—One Who has Only a Right to pasture his stock on another's land, adjacent to a railroad, is entitled to the protection of the statute requiring railroad companies to maintain a fence.

APPEAL from Superior Court, Tehama County; Charles P. Braynard, Judge.

*For subsequent opinion in bank, see 94 Cal. 568, 29 Pac. 1110.

Chipman & Garter for appellant; John F. Ellison and A. M. McCoy for respondent.

TEMPLE, C.—This action is for damages for killing plaintiff's sheep by the defendant's locomotive and cars. Plaintiff was the owner of a band of about three thousand sheep, which he avers were lawfully grazing in a field adjoining defendant's railway, near Rawson's switch, in Tehama county; that, by reason of the failure of the defendant to make and maintain a good and sufficient fence, they, without his fault, strayed upon the track of the railway, and were run over and killed; also that defendant so negligently and carelessly ran and managed its engine and cars that they ran over and killed plaintiff's sheep. The defense is a general denial and a charge of contributory negligence. It appears that Boyd Bros. were in possession of what was known as the "Healey Ranch," as tenants of one Kraft. In the fall of 1889, they sold to plaintiff the stubble feed on the ranch after the grain was removed, and let him into such possession as was necessary to enable him to pasture the fields. Plaintiff was to take charge of his sheep while there, Boyd Bros. assuming no responsibility with reference to them. Boyd Bros. continued to live upon the place, and contracted with plaintiff to board his herder. Plaintiff had possession of no buildings, was not to reside upon the place, but kept his herder there to look after the sheep. Under this contract he drove his sheep on the place on or about the sixteenth day of September, and they were left there in charge of a herder. On the night of the 7th of October the herder "camped the sheep" about one mile and a quarter from the railroad. After "rounding them up" at this place, he remained until some of them had laid down, apparently for the night, and then went home. The night was rainy, and the sheep strayed from this place to an opening in the fence at Rawson's switch, and out upon the track, and were run over, and some of them killed, by a train running toward Red Bluff, at about half-past 7 in the evening. The same train returned in the morning, and again ran over and killed some more of them at about the same place. Rawson's switch, where the sheep entered, was a flag station, and the land inclosed by the defendant at that point is wider than at other places. On the

side next this field the fence is some two hundred and seventy feet farther from the track. This extra width is sixty panels measured by the fence, or about one thousand feet in length along the railway. Near the center of this the Rawson and Healey ranches join, and the opening is near the division fence. The defendant had quite recently constructed a new fence along the right of way and this extra width or reserve, which was evidently intended for use in connection with the station. The opening had been made by Boyd Bros. with the consent of the section boss or master. His duty in reference to such matters appears from the evidence of Davis, the division foreman, to be, if he finds any slight repairs required in the fence which he has the means to make, then to make such repairs, but defects which he has not the lumber or other means to repair it is his duty to report to the division foreman. Boyd Bros. desired this opening for their private accommodation. There was already a gate through which they could have had access to the station, but it was less convenient. They took down a panel sixteen feet long, in March preceding the accident, and it had never been replaced, or the fence made good by a gate or any other device. The section-master, when he gave consent to make the opening, promised to have a gate placed there, but it had never been done. The old fence, which had shortly before been replaced by the new one, had an opening at the same place, in which there had never been a gate. In short, there had always been an open road there leading from Boyd's house to the station. The field was a large one; how large is not shown. But it extended from the Sacramento river on the south to the railway on the north, and it is stated that the house was about one mile from the railway, and a mile and a half from the river; also that all the bottom land was in grain, and four hundred acres of the upland. The plaintiff and his herder both testify that they had not seen this opening before the accident, and did not know of its existence. The plaintiff had seen two gates opening into the right of way, and had given special directions for extra care in keeping them closed. The sheep had been upon the place about twenty days before the accident, and during that time Boyd Bros. had done some hauling through this opening, as they had done before.

A motion for a nonsuit was made at the conclusion of plaintiff's evidence, on the ground of insufficiency, specifying the particular defect claimed; but as the motion was denied, and further evidence put in by both parties, it is not now necessary to consider whether this motion was properly denied; for all the points which can now be urged against this ruling arise also upon the objections to the sufficiency of the evidence to justify the verdict. At the trial very numerous exceptions were taken to the rulings, admitting, or refusing to admit or strike out, evidence. We have carefully examined the record as to these objections, and, as to most, it is sufficient to say there is nothing in them, or the evidence in question was so entirely immaterial that no harm could result either way. A few only we deem it necessary to specially notice. A large number of such exceptions have reference to opinion evidence, as to the proper herding of sheep and the custom of other herders in such cases. The matter in contention seems to have been whether the fact that plaintiff's herder "rounded the sheep up," as the phrase is, a mile and a quarter from the track, and, after some had lain down, took his dog and went off for the remainder of the night, was contributory negligence. But we think, as matter of law or of general knowledge, this would not constitute such negligence as would relieve the defendant of liability. Evidence, therefore, upon this point could not have been prejudicial to the defendant.

One source of damage stated in the complaint is the failure to maintain a good and sufficient fence. In McCoy v. Railroad Co., 40 Cal. 532, 6 Am. Rep. 623, it is said: "The neglect of the defendant to build the fence certainly did not operate to dispossess the plaintiff of his entire field, or, what is the same thing, prevent him from making lawful use of it. Besides, he probably knew that, so long as the defendant chose to continue running its cars upon this open track, it undertook at its peril that no harm should come to the stock for the want of a proper fence." It must follow that adjoining proprietors may use their land whether fenced or not, or whether the fence is sufficient or not, and are not bound ordinarily to take any precautions, even when they know the fence to be insufficient, but may use their land in the ordinary manner, relying upon the responsibility of the railroad corporation in case of loss.

Whatever complaint the owner of the sheep could have made on the subject of want of care on the part of his herder, as against dogs or coyotes, or panic from any source, the defendant was not interested in it. Had there been a good and sufficient fence, with no openings in it, there certainly would have been no negligence, in reference to the defendant, in leaving such a band of sheep overnight without a keeper, in a stubble field of the extent of this one. There was proof that neither plaintiff nor his herder knew of the open space in the fence. It appears that the fence along the right of way was in general a good one, and there is no allegation in the complaint in reference to the open space through which the sheep passed to get upon the track. Objection is made that, without such allegation, evidence of damage in such case is inadmissible. But it is evident, admitting that the defect in the fence is the fault of defendant, that the averment that defendant failed to maintain a good and sufficient fence would include such a defect, or any defect, which rendered the fence insufficient. The case of Jahant v. Railroad Co., 74 Cal. 9, 15 Pac. 362, does not sustain appellant. In that case there was no such allegation as to the insufficiency of the fence, but the damage was averred to result from the careless and negligent management of defendant's cars. The horses were on the track, therefore, presumably through the fault of the plaintiff. A remark was made, apparently not necessary for the decision of the case, that this presumption was not sufficiently negatived by the general averment that the animals escaped without his fault.

The court refused to give the second instruction asked by the defendant. It reads as follows: "I instruct you, gentlemen of the jury, that a person who pastures his sheep upon the land of another person, required by law to be fenced by a railroad corporation, upon an understanding or agreement with such owner or his tenant, by which it is agreed that such owner or tenant shall not, in any degree or manner, become responsible for the safekeeping of said sheep, but that said sheep shall be taken care of exclusively by their owner and his herders, and such owner or tenant of the land shall remain in possession of the land, taking care of the fences, making and using openings therein, cultivating and tilling the soil, reserving the use of all buildings and farm implements, and

in every way exercising acts of dominion and control over said premises, except merely permitting the owner of the sheep to keep his sheep upon the premises, for the sole purpose of eating the feed therefrom growing upon said lands, is not entitled to the protection of the statute requiring a railroad corporation to fence such lands." We think the court properly refused this instruction. Any person lawfully occupying the land is entitled to the protection of the statute. One who only has the right to pasture his stock temporarily upon the land, as admittedly the plaintiff in this case had, is as much entitled to its benefit as the owner of the land.

The third instruction was properly refused. The objections to it are numerous. It required the court to usurp the province of the jury, and draw conclusions from the evidence. It erroneously implies that there was a necessity of notice to defendant of the opening, although made with its knowledge and consent. It ignores the duty of the defendant to take constant care of its fences, which require it to know within reasonable time of defects, and to repair them. The evidence we think, plainly tended to show that there was a mixed possession of the ranch by plaintiff and Boyd Bros. The principal dominion and control was doubtless in the plaintiff. But at the same time Boyd Bros. were also living upon the place with such limited possession and rights as would not interfere with the plaintiff. The defendant at the trial took the ground that, under such circumstances, plaintiff had no rights under the statute at all. In this we think it was wrongly advised. No doubt, however, under such circumstances, the parties having a mixed possession, under a contract, each, under certain circumstances, is liable to suffer for the acts of the other. If, for instance, the opening was in the fence through the fault of Boyd Bros. during such co-occupation, and through no fault of defendant, the plaintiff ought not to have recovered. Had an instruction embodying this proposition, and free from objection, been offered, it should have been given. But, although counsel for the defendant made the proposition in various ways, it was always accompanied with something which justified the court in refusing it. Generally, as in the third instruction asked, it was stuffed with an argument which counsel was anxious to have the court make to the jury—a practice which has become altogether too common. An instruction

should be a simple proposition of law, in form, if possible, specially applicable to the facts of the case. But the argument as to its effect should, in general, be left to counsel.

The sixth rejected instruction comes nearest to this simple legal proposition. But there the relation between Boyd Bros. and plaintiff which the jury were required to find, in order to apply the rule, was simply that plaintiff entered into the use of the pasture under contract with Boyd Bros. The fact of co-occupation was ignored. In this case counsel differ widely as to the rights acquired by plaintiff under his contract. Defendant insists that Boyd Bros. were left with full dominion and control, and plaintiff had not even a qualified possession. The instruction lays down no rule which the jury could understand. They are told plaintiff cannot recover if Boyd Bros. could not have recovered under similar circumstances. If similar means the same, the conclusion is quite obvious, and needed no indorsement from the court. If not the same, but in some respects like, in what respects? The jury are not told under what circumstances Boyd Bros. could not have recovered. But why refer to such hypothesis? The question was not as to the liability of Boyd Bros., but whether, under the circumstances, plaintiff could recover. An instruction could easily have been framed to the effect that a joint occupation, by mutual consent, being found from the evidence, plaintiff could not recover if the opening was made by Boyd Bros., without the consent of defendant, and there was no negligence on its part. Outside of the questions already discussed, the charge that the evidence is insufficient to sustain the verdict must depend upon the question whether there was evidence tending to prove the authority of Daly, the section-master, to authorize the opening in the fence. We think there was sufficient evidence to justify such conclusion. In their business railroad companies require numerous agents, of whose authority the public knows nothing, save what appearances indicate. It is important both to the public and to the company that such appearances be implicitly relied upon. Unless they were so, the business of such companies would be greatly impeded. It was clearly the duty of the defendant to have some agent whose duty it would be to take care of the fences which it was bound to maintain. The facts show that the agent whose duty it was in this case to keep watch over the

fences was Daly. The court and jury were not bound to take his disclaimer of authority as conclusive. We think the weight of the evidence was with the conclusion of the jury upon the subject. We think the judgment and order should be affirmed.

We concur: Vanclief, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFARLAND, J.—I dissent. The Boyd Bros. were clearly in possession and control of the land and the fences. If they opened the fence, they certainly could not have recovered if their sheep had gone through the opening and been killed. Plaintiff's sheep were being pastured on the land subject to the general control of the land by the Boyds; and, if the sheep were injured by any misconduct of the Boyds, the latter were, perhaps, responsible to plaintiffs for such injury. But if the Boyds kept the fence open for their own convenience, neither they, nor anyone temporarily occupying part of the land for a special purpose under them, can complain of the defendant. This proposition is practically admitted in the prevailing opinion of the court, but it is said that this proposition was not presented in the instructions asked by appellant. I think it was clearly presented, particularly in the sixth instruction asked. I think that the phrase, "if the Boyd Bros. could not themselves have recovered damages to their stock under similar circumstances," could not possibly have been understood by the jury in any other way than as meaning that if the sheep had belonged to the Boyd Bros., and had escaped onto the railroad under the circumstances under which plaintiff's sheep so escaped, and the Boyd Bros. could not recover, then plaintiff could not recover. I do not see how any intelligent jury could understand it in any other way. I think that the judgment should be reversed.

I dissent: Beatty, C. J.

PEOPLE v. BRUGGY.*

No. 20,706; May 22, 1891.

26 Pac. 756.

Homicide—Self-defense.—An Instruction That if Defendant killed deceased in resisting an attempt on the part of deceased to "murder" defendant, or an attempt to do defendant great bodily harm, then the killing was justifiable, is not fatally erroneous, as it does not tend to lead the jury to understand that an attempt to kill defendant not constituting murder would not justify the killing by defendant.

Homicide—Self-defense.—An Instruction That if Defendant drew his pistol with a deliberate intent to kill deceased, and that deceased saw the pistol, and, believing himself in danger of defendant, ran away, and that defendant, with intent to willfully and deliberately kill deceased, followed for the purpose of overtaking or meeting and killing him, and did meet him, unarmed, and showing no disposition to kill defendant, and defendant then and there, without believing himself in danger of losing his own life, fired, and killed deceased, then the evidence showed no self-defense, cannot be objected to on the ground that it omits the hypothesis of defendant's being in danger, or believing himself in danger, of receiving great bodily harm.

APPEAL from Superior Court, Sonoma County; S. K. Dougherty, Judge.

J. C. Sims for appellant; W. H. H. Hart, attorney general, for the people.

PER CURIAM.—The defendant was convicted of murder in the first degree, and is under sentence of death. He appeals from the judgment rendered against him, and from an order refusing a new trial. He makes the point that the evidence is insufficient to sustain the verdict. The jury had before them persons who witnessed the homicide, and all its attendant circumstances. There was certainly some evidence which tended to show the guilt of the defendant as charged; and that being so, we are not warranted in saying that the

*For subsequent opinion in bank, see 93 Cal. 476, 29 Pac. 26.

jury gave it improper weight, and should not have returned the verdict which they did.

It is further claimed that the instruction of the court was erroneous, which was in this language: "If the jury believe from the evidence in this case that the defendant, Bruggy, killed the deceased by shooting him, and that the shooting was done by Bruggy in resenting an attack on the part of the deceased to murder him, Bruggy, or an attempt on the part of the deceased to do great bodily harm to him, Bruggy, then in such case I instruct you the killing by Bruggy was justifiable, and you should find the defendant not guilty. The rule in such a case is this: What would a reasonable person—a person with ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from his situation and his surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting on such appearances." The defendant contends that this instruction should not have confined his right to kill the deceased to a state of facts where the deceased was endeavoring to murder Bruggy, or to do him some great bodily harm, but that it should have stated further that an attempt to kill Bruggy by the deceased, either with or without malice aforethought, would have warranted the defendant in taking the life of the deceased, and that the word "murder" was misleading in the connection in which it was used. It must be borne in mind that this instruction was to the effect that, if the whole evidence showed a certain condition of affairs, the defendant was to be acquitted. If it had stated that Bruggy was not to be acquitted unless murder or some great bodily harm was then about to be accomplished by the deceased, then it is plain that the instruction would be misleading. But it is not manifest that as reasonable men the jury could have understood the instruction to mean what the defendant claims. Such a construction by them would not be harmonious in any degree with the language used by the court, and, although to be strictly accurate, the words suggested, or some others appropriate to convey the idea, would have made the instruction clearer, the omission to do so did not, in our opinion, have or tend to have

a misleading effect. The test in such a matter as this is not that a given instruction is erroneous merely, but, if the court can see that it did not mislead the jury, the judgment will not be disturbed: Hayne on New Trial and Appeal, sec. 122.

We do not perceive that the instructions of the court with reference to what constitutes murder in the first and second degrees were either misleading or erroneous. If appellant desired any further instructions on that subject he should have asked for them: People v. Franklin, 70 Cal. 642, 11 Pac. 797; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

Another ground on which the appellant urges that the judgment and order should be reversed is that the jury were erroneously instructed and misled by the court in the following instruction: "If you believe from the evidence that the defendant, while upon the sidewalk, drew his pistol with a deliberate intent to kill and murder Dick Louison, and that Dick Louison saw the pistol, and, believing himself in danger of the defendant, ran away, and through the alley, and into the saloon, to avoid the defendant; and you further believe from the evidence that the defendant, with intent to willfully and deliberately kill and murder Louison, entered and passed through the saloon with the pistol in his hand, for the purpose of overtaking or meeting him and killing him; and you further believe from the evidence that he did meet the deceased coming into the saloon through one of the back doors of the saloon, unarmed, and showing no disposition to kill and murder the defendant, and that the defendant then and there, without believing himself in danger of losing his own life at the hands of Dick Louison, fired the fatal shot, and killed said Louison—then I instruct you the evidence shows no self-defense." The objection to this instruction is that it is confined to a reasonable ground for belief by appellant that he was in danger of "losing his own life," and does not include the other proposition, that he was in danger, or believed himself in danger, of receiving great bodily injury. If the instruction had been intended as an abstract statement of the general doctrine of self-defense there might have been some force in the objection, although even in such case, if the court should give another instruction containing the element of fear of great bodily injury (as was done in the case at bar), it is difficult to see how error could be successfully assigned. But

such was not the case with respect to the instruction in question. It was based upon a hypothesis (founded on the evidence) which excluded the notion of self-defense entirely. If a defendant pursues the deceased (who runs away) with a drawn pistol, intending to kill and murder the deceased, and does not make any endeavor to decline any further struggle, the fact that at the moment of the fatal act the deceased makes some effort to defend himself, which may put the defendant in danger of either death or bodily injury, does not constitute self-defense. The instruction would not have been erroneous if it had not contained any allusion at all to the defendant's belief of danger to his own life. There was nothing in it of which defendant at least could complain. The law of self-defense was very correctly given to the jury in the general charge of the court, which was as favorable to defendant as he could reasonably expect; and we see no error that would warrant a reversal of the judgment.

The evidence discloses that the killing of the deceased was to some extent the result of a drunken brawl; and it would seem that a verdict by the jury of imprisonment for life would have satisfied the law, but that is not a question to be here considered. The law gives the power of fixing the punishment in such cases to the jury, and the only appeal from their decision as to that matter is to the executive. The judgment and order denying a new trial are affirmed.

PATERSON, J., Dissenting.—I think the instruction referred to in the opinion was erroneous. It ignores the fact that the defendant may have declined any further struggle immediately prior to the firing of the shot. Although he was the assailant, if he in good faith "endeavored to decline any further struggle before the homicide was committed, the homicide was justifiable": Pen. Code, sec. 197, subd. 3. Whether he did so decline further combat was a question of fact for the jury to determine on the evidence. It cannot be said that there was no evidence tending to show such a declination. The parties met right at the back door of the saloon, and the deceased immediately grabbed the defendant by the arms, and pushed him back several feet to the billiard-table, and was pushing him over against it when the fatal shot was fired. What occurred beyond what has been stated, or what,

if anything, was said by either party after they met at the rear door of the saloon, and before the shot was fired, does not appear in the evidence. If the defendant did decline further struggle, he was justified in shooting the deceased if he believed that he was in danger of receiving great bodily injury. This element was also omitted from the instruction.

The court instructed the jury that "to reduce a felonious homicide from the grade of murder to that of manslaughter, upon the ground of sudden quarrel, or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions; and it must appear that the party acted under the smart of his sudden passion and resentment." Here the element of malice is entirely wanting in the charge, yet without malice there can be no murder. The instruction is erroneous because it in effect tells the jury that, although the defendant acted under a heat of passion, it could not be manslaughter unless the provocation was of such a character as would naturally excite and arouse the passions of an average man. The question is not whether some other person would probably have been excited and thrown into a passion by similar circumstances, but whether the defendant acted "upon a sudden quarrel or heat of passion": Pen. Code, sec. 192. What will excite and anger one man might simply amuse another. The court gave this instruction: "Upon the law of self-defense, I instruct you as follows: To justify the killing of another in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired. If the jury believe from the evidence that the defendant, George Bruggy, at the time he fired the fatal shot which killed the deceased, Dick Louison (if he did fire such shot and kill him), believed, and had good reason to believe, that his life was in imminent danger at the hands of said Dick Louison, then I charge you that the defendant was justifiable in firing said shot, and you should acquit him." This instruction is loaded down with errors of a glaringly prejudicial character. The first part of the instruction has been condemned here several

times: People v. Flahave, 58 Cal. 250; People v. Gonzales, 71 Cal. 577, 12 Pac. 783; People v. Dye, 75 Cal. 113, 16 Pac. 537. The last part of the instruction in effect tells the jury—and no doubt they so understood it—that unless the defendant believed, and had good reason to believe, that his life was in imminent danger, he was not justifiable in firing the shot, thus ignoring the question of appearances, and fear of great bodily injury: People v. Flanagan, 60 Cal. 4, 44 Am. Rep. 52; Pen. Code, sec. 197. If these instructions were erroneous (and I think it must be conceded that they were), they were not cured by other instructions on the same point, although the latter may have been correct: People v. Anderson, 44 Cal. 65. The court in another instruction used this language: "If the murder was deliberate and premeditated, it was murder of the first degree; otherwise it was murder of the second degree." In calling the attention of the jury to the fact that the defendant had been a witness in his own behalf, the court said: "It is proper for the jury to consider whether this position and interest [the defendant's] may not affect his credibility, or color his testimony." The peculiar terms employed here seem to indicate an intimation by the learned judge that the defendant's interest in the case had evidently caused him to "color his testimony." The defendant requested the court to give an instruction on the question of reasonable doubt, which has been several times approved here. It was refused on the ground that it had already been given in the charge of the court, and it is true that the substance of the instruction was given by the court in its own charge, but it was given in such an attenuated form that I think the defendant may justly complain, although standing alone, perhaps, it could not be held to be prejudicial. It is true some of the instructions I have referred to have not been criticised by counsel for the appellant in his brief, but they were all excepted to in the court below, and I think, considering the importance of the case, it is the duty of our court to notice them, whether defendant's counsel refers to them or not. The learned judge of the court below doubtless would have corrected the instructions if his attention had been called to the matters omitted therefrom, but I am unable to see how it can be claimed that other instructions given on the same subject cured the errors in those referred to.

FLYNN v. DOUGHERTY.*

No. 13,032; May 30, 1891.

26 Pac. 831.

Building Contract—Bond.—Where in an Action for a Breach of contract it appeared that defendant verbally accepted plaintiff's written offer to furnish stone for a building defendant had undertaken to build, and that plaintiff was required, as one of the conditions, to execute a bond for the performance of the work and to commence the work as soon as possible, the failure of plaintiff to furnish or tender the bond within eight or nine days precludes his right to recover prospective profits, when nothing has been done under the bid.

APPEAL from Superior Court, Santa Clara County; F. E. Spencer, Judge.

Jarboe, Harrison & Goodfellow for appellant; Charles F. Wilcox for respondent.

VANCLIEF, C.—This is an appeal from a judgment of nonsuit and from an order denying plaintiff's motion for a new trial. The complaint alleges, in substance, that in July, 1886, the plaintiff contracted with the defendant to cut, furnish and deliver to the defendant the stone required for the construction of the state asylum about to be erected in the county of Santa Clara, for the sum of $6,883; that plaintiff was at all times ready and willing to perform the contract on his part, but that the defendant refused to accept the stone, and gave plaintiff notice of such refusal, and prevented plaintiff from performing the contract, and wholly repudiated it, to the damage of plaintiff in the sum of $2,000. The answer specifically denied each allegation of the complaint. Upon the trial, the plaintiff testified that on the ninth day of July, 1886, he presented to the defendant a bid or offer in writing, of which the following is a copy:

"San Jose, July 9, 1886.

"The undersigned propose to cut, furnish, and deliver the stone-work of the asylum to be built at Agnew station, according to the plans and specification of Mr. Jacob Lenzen & Son,

*For subsequent opinion in bank, see 91 Cal. 669, 27 Pac. 1080.

architects, for the sum of six thousand eight hundred and eighty-three ($6,883.00) dollars.

"THOMAS FLYNN."

Plaintiff admitted that there was no contract or memorandum in writing between him and the defendant for the stone-work mentioned in the complaint; and further testified that the defendant was himself bidding for the construction of the state asylum at Agnew station, and a few days thereafter informed plaintiff that the contract for its construction had been awarded to him (defendant), and that plaintiff's bid for the stone-work was accepted, telling him at the same time that a bond would be required of him (plaintiff), and that he should make arrangements to commence work as soon as possible, so as not to delay the construction of the asylum; that on July 20th plaintiff came to San Jose, and after meeting with the defendant was informed by him that the contract for the stone-work had been given to another person; that he was at all times ready to carry out and perform the contract on his part, and for that purpose had brought his foreman to San Jose, and instructed other workmen to follow; that the cost of the work would not have exceeded $4,500, and that if he had completed the contract he would have realized therefrom a profit of over $2,000; that he had quite a lot of stone on hand already quarried that could have been used, which it would have cost between $500 and $600 to quarry, and which he had previously quarried while he was getting out other work, the most of which is still on hand; that if the stone had been cut according to his bid and the specifications, and had not been used in the construction of the asylum, it would not have been available for other purposes or salable in the general market, but that none of the stone was so cut, and none of it was delivered, nor was any money paid therefor by defendant. Another witness testified to a conversation with the defendant in which he told the witness that Flynn had got the contract for cutting, furnishing and delivering the stone for the asylum. No other evidence was given or offered in the case, and defendant moved for a nonsuit on the ground that the alleged contract was for the sale of goods and chattels, and as there was no note or memorandum thereof in writing signed by defendant, nor any acceptance or receipt of the goods or any part thereof, nor any payment of any part of

the purchase money, as required by the fourth division of section 1624 of the Civil Code, the contract was invalid, and on the further ground that the plaintiff failed to prove that he had sustained any damage. The court sustained the motion, and plaintiff excepted. I am inclined to the opinion that the alleged contract was not within the statute of frauds, but it is unnecessary to decide that question, since, according to plaintiff's own testimony, the acceptance of his offer by the defendant was only conditional, the condition being that plaintiff must give a bond for the performance of the work. There is no evidence tending to prove that plaintiff ever gave or offered to give the bond, without which even the proposed verbal contract was incomplete. It appears that the negotiation was opened by the uninvited offer of plaintiff to do the stone-work according to certain specifications for a certain price. At the same time that defendant said he accepted the offer he also said that plaintiff should give a bond, and commence the work as soon as possible. About eight or nine days thereafter, without having given or offered to give the bond, the plaintiff returned to San Jose, when he was told that the work had been let to another party; but even then he did not offer to give the bond, nor does he testify that he then offered to commence the work, but only that "he was at all times ready to carry out and perform the contract on his part," by which he may have intended to be understood that he offered to commence the work. But his offer to commence the work, if he did so offer, before he tendered the bond, was nugatory. He claimed no other damage than being deprived of prospective profits, but, as he signally failed to prove a contract, he is not entitled to even nominal damages. I think the judgment and order should be affirmed.

We concur: Foote, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. BRUGGY.

No. 20,706; June 16, 1891.

26 Pac. 965.

Rehearing—New Question—Death Sentence.—On appeal from a sentence of death, the supreme court will consider questions raised for the first time in a petition for rehearing.

PER CURIAM.—In this case we are entirely satisfied with the correctness of the decision heretofore rendered upon all the points discussed in the opinion of the court. But in their petition for a rehearing counsel for the defendant present an altogether new point, as to which we have grave doubts. In civil cases we have invariably refused to grant a rehearing for the purpose of considering a suggestion of error made for the first time in the petition for rehearing, but we feel constrained to relax this rule in a criminal case in which the defendant is appealing from a judgment of death. Rehearing granted.

THORNTON v. PETERSEN.

No. 13,195; June 22, 1891.

26 Pac. 1091.

Appeal—Weight of Evidence.—Where the Sole Question is one of fact, and the evidence is sufficient to support the findings, the judgment will be affirmed.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

J. C. Bates for appellant; Whittemore & Sears for respondent.

TEMPLE, C.—This appeal is from the judgment, and from an order denying plaintiff's motion for a new trial. The only alleged errors are specifications under the claim that the evi-

dence was insufficient to justify the decision. We have carefully examined the record, and are satisfied that there is abundant evidence to sustain all the findings. It is really an attempt to have this court weigh the evidence, and decide the case according to the preponderance. The appeal ought not to have been taken. The judgment and order should be affirmed.

We concur: Belcher, C. C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

HEWITT v. DEAN et al.

No. 14,011; June 25, 1891.

26 Pac. 1101.

Judgment of Department—Rehearing in Bank.—A motion before one department of the supreme court, to set aside a sale of real property, will be dismissed, without prejudice to its renewal, where the judgment of that department on which it rests has been set aside, and a hearing in bank ordered.

Motion before Supreme Court.

Victor Montgomery for appellants; Ray Billingsby for respondent.

PER CURIAM.—This cause is pending before this department upon a motion to set aside the sale of certain real property; but as the judgment in this court upon which said motion rests has been set aside, and a hearing in bank ordered, the motion is dismissed without prejudice to its renewal, if the circumstances under which it was made again occur.

ROMINE v. CRALLE et al.

Nos. 13,117, 13,228; June 30, 1891.

27 Pac. 20.

Appeal.—Where Appellant has Filed No Brief showing the particular ground on which he relies for reversal, and on examination of the record no error prejudicial to him is apparent, the judgment will be affirmed.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

John F. Burris, Carroll Cook and R. M. Swain for appellant; Laughlin & Thompson for respondent.

BELCHER, C. C.—The judgment in this case was rendered by the superior court of Sonoma county on October 1, 1888. Subsequently three appeals were taken by the defendant Hirschler. The first appeal was dismissed, without prejudice, on the ground that the transcript was not filed in time. The second appeal was from the judgment alone, on a bill of exceptions. The third appeal was from the judgment, and an order denying a new trial, and, in so far as it was from the order, was dismissed on September 30, 1889: 80 Cal. 626, 22 Pac. 296. The records on the last two appeals from the judgment are the same, and they may be disposed of together. No brief has been filed on behalf of the appellant, and we are therefore not advised on what particular ground or grounds he relies for a reversal. We have, however, examined the records, and in our opinion no error prejudicial to the appellant is therein shown. We advise that the judgment be affirmed.

We concur: Foote, C.; Fitzgerald, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

BERRY et al. v. KOWALSKY.*

Nos. 13,116, 13,309; July 22, 1891.

27 Pac. 286.

Option.—A Complaint for the Breach of the Following Contract, "Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me, at any time within thirty days from date, five hundred tons S/87 wheat, at one dollar and eighty cents per cental," signed, "E. H. K.," which is set out in haec verba, is sufficient on demurrer, although it does not allege that defendant executed the same.

Option.—The Fact That the Abbreviation "S/87" is used as descriptive of the wheat to be delivered under the contract does not make the complaint unintelligible and uncertain, as oral evidence may be introduced to explain the customary meaning, and need not be pleaded.

Option.—Where the Contract Sued upon was Written on a Sheet, with rules of the produce exchange printed at the head, and plaintiff testified that it was no part of the contract, and that the contract had no connection with the exchange, it was error to exclude evidence tending to show that it was an exchange contract, as well as the exchange rules governing such contracts.

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawler, Judge.

Action by F. G. Berry and John F. English against E. H. Kowalsky for breach of contract. Judgment for plaintiffs. Defendant appeals. Reversed.

Thornton & Merrybach for appellant; Whittemore & Sears for respondents.

VANCLIEF, C.—There are two appeals in this case, upon distinct records. No. 13,116 is from the final judgment, and upon the judgment-roll. No. 13,309 is from an order denying defendant's motion for a new trial, upon a record consisting of a statement of the case in addition to the judgment-roll. On the appeal from the judgment it is contended that the

*For subsequent opinion in bank, see 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

court erred in overruling the defendant's demurrer to the complaint, and that the findings do not support the judgment. On the appeal from the order the errors assigned are errors in law occurring at the trial. The following is a copy of the verified complaint: "The said plaintiffs complain of the said defendant, and for cause of action herein allege: That on the 15th day of July, 1887, the plaintiffs paid to defendant the sum of $100 for the right and privilege of delivering to defendant five hundred tons of wheat at any time within thirty days from said fifteenth day of July, at the rate of one dollar and eighty cents per cental. Said contract is in the following words and figures, to wit:

" 'San Francisco, July 15, 1887.

" 'Received of A. Gerberding one hundred dollars, for which I allow him the privilege of delivering me at any time, within thirty days from date, five hundred tons S/87 wheat, at one dollar and eighty cents per cental.

" 'E. H. KOWALSKY.'

"That said contract was made in the name of A. Gerberding, as the agent of plaintiffs, but the plaintiffs were and still are the real parties in interest; that said plaintiffs, on the thirteenth day of August, 1887, in the said city and county of San Francisco, at the office of said defendant, tendered the delivery of said five hundred tons of wheat to said defendant, and performed all the conditions on their part under said contract. Said plaintiffs then and there demanded from said defendant the sum of eighteen thousand dollars, payment as the price of said wheat according to said contract; that said defendant denied having purchased said wheat, and refused to pay for said wheat, to the damage of plaintiffs in the sum of eighteen thousand dollars; that said plaintiffs made said contract with said defendant in good faith, for the purpose of delivering said wheat to said defendant, and had said wheat in warehouse in San Francisco for the purpose of delivering the same on said contract to said defendant. Wherefore plaintiffs pray for judgment against said defendant in the sum of eighteen thousand dollars, interest and costs of suit, and for such other and further relief as justice may require.

"WHITTEMORE & SEARS,

"Att'ys for Plaintiff."

This complaint was demurred to on the ground (1) that it is ambiguous, unintelligible and uncertain, in that "no meaning is alleged of the words 'S/78' in the contract"; and (2) that the complaint does not state facts sufficient to constitute a cause of action. The alleged contract is not, does not purport to be, and is not alleged to be, an agreement "to sell and buy," nor an agreement on the part of the plaintiffs to sell wheat at any time. It imposes upon the plaintiffs no obligation to be performed by them. If it be a valid contract, it is an agreement by the defendant, for an executed consideration, to buy and accept delivery of, from the plaintiffs, a certain quantity of wheat, within a certain period of time, for a certain price, at the option of the plaintiffs, and to pay plaintiffs the price therefor: Civ. Code, secs. 1726–1730; Wharton on Contracts, sec. 453a. Nor is the action brought to recover the price or value of wheat "sold and delivered," or "bargained and sold," but to recover damages for defendant's breach of his alleged conditional agreement to buy the wheat at plaintiffs' option.

1. As against a general demurrer, I think the facts expressed and implied in the complaint barely constitute a cause of action. The written instrument set out purports to have been signed by the defendant, and it is designated as the contract for the breach of which (afterward alleged) the action is brought. This implies that it was executed by the defendant. The instrument admits the receipt of a consideration of $100, for which defendant "allows" (gives) plaintiffs the "privilege" (option) to deliver (or not) to defendant, within thirty days, 500 tons of wheat, "at [the price of] one dollar and eighty cents per cental." The giving of the privilege to deliver the wheat to defendant at a certain price implies that he will receive it and pay for it the price specified. The foregoing, I think, is the only admissible construction of the instrument as pleaded. If it will not bear this construction, it can have no effect as an agreement. As a breach of this agreement, it is alleged that, within thirty days, the plaintiffs tendered a delivery of the wheat, and demanded payment of the price, thus creating the condition upon which defendant's liability depended; and that defendant refused to pay the price. This shows a breach of the agreement, for

which the plaintiffs were entitled to such damages as proximately resulted therefrom.

2. The grounds of the special demurrer, that the "complaint is ambiguous, unintelligible and uncertain," do not appear on the face of the complaint. The words or abbreviations "S/87" appear to have been used as descriptive of the wheat, and to require oral evidence of their customary meaning in the business of dealing in wheat; but such oral evidence need not be stated in a pleading in which the written agreement is set out in haec verba. The meaning may be proved on the trial for the purpose of enabling the court to interpret the words: Civ. Code, secs. 1636, 1644–1646; Callahan v. Stanley, 57 Cal. 476. Had it appeared on the face of the complaint that, even with the aid of parol evidence, the words "S/87" as used were meaningless, and that a complete contract was expressed without them, they might have been disregarded as surplusage (Harrison v. McCormick, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830); and certainly a complete contract is expressed without them. But it does not appear that, read in the light of admissible oral evidence, they are meaningless or unintelligible. So read, they may have a certain unambiguous meaning descriptive of the subject of the contract. Therefore the court could not see, on the trial of the demurrer, that those words were unintelligible, or that their use rendered the complaint ambiguous or uncertain.

3. The execution of the contract, and the breach thereof, as alleged, are found as facts. Therefore, the findings support the judgment.

4. The contract, as set out in the complaint, being denied, it appears by the statement on motion for new trial that, to prove the contract, plaintiffs offered in evidence a paper on which was written the alleged contract as pleaded. Above the manuscript, and on the same paper, was printed matter composed of what was admitted to be extracts from the rules of the Produce Exchange and Call Board of San Francisco. The paper was objected to by counsel for defendant on the ground that it varied from the contract as pleaded, the printed matter not being set out in the complaint. Thereupon, for the apparent purpose of proving that the printed matter was no part of the contract, and that the contract was entirely independent of the printed heading, the plaintiff Berry, on

behalf of plaintiffs, testified to the circumstances under which the contract was made, and to what he claimed to have been all the verbal negotiations—all that was said by each party—preceding and leading up to the signing of the written contract, which, he said, was drawn by him according to the verbal understanding. He was further permitted to testify, against the objection of defendant's counsel, that the "contract was drawn independent of any connection with what is known as the 'Produce Exchange.' . . . . I was not figuring on the contract on the board. It was business outside. . . . . I never read the printed matter on the top of the contract. It had nothing whatever to do with the contract. It is the written portion of this piece of paper that constitutes the entire contract between myself and the defendant." F. J. Bonney, a witness for the defendant, testified that he was a farmer, and was a member of the Produce Exchange and Call Board on or about July 15, 1887, and was somewhat familiar with the rules thereof, and that he was present when the contract in suit was made, and heard the preliminary talk between the parties, but was not present when defendant signed the contract. Thereupon defendant's counsel asked the witness the following questions, each of which was objected to on the ground that the effect of the answer thereto would be to vary the written contract; and the objection to each question was sustained by the court, defendant duly excepting: "Question. Was there any reference had in the conversation between these parties to what was known as the 'Call Board Contract'? Q. Was anything said about the contract which was to be entered into between the parties being governed or to be complied with or performed under the rules of the San Francisco Produce Exchange and Call Board? Q. Was the term 'board contract' used in reference to the contract proposed to be executed by them in regard to the dealing in wheat upon which they were entering?" The defendant's counsel also offered in evidence all the rules and regulations of the Produce and Exchange Call Board; but, upon objection by plaintiffs' counsel, they were excluded by the court. It appeared that the plaintiff English and Gerberding (in whose name the contract was made) were members of the exchange board at the date of the contract. The defendant, at the same time, owned a seat in the board, but was not then occupying it,

having leased it temporarily to another person. The plaintiff Berry had formerly been a member of the board. As to whether, under the facts and circumstances disclosed by the evidence, the contract could properly be considered a "board contract," and as to what extent, if at all, it was governed or affected by the rules and customs of the board, the testimony was conflicting. Without deciding whether the testimony of Berry on the part of the plaintiffs was properly admitted or not, I think after it was admitted the proffered testimony of Bonney, and the rules of the exchange board on the part of defendant, should also have been admitted. The testimony of Berry may have influenced the decision of the court to the prejudice of the defendant, and it does not appear that it did not. Had the testimony of Bonney and the rules of the board been admitted, they might have even more than neutralized the effect of Berry's testimony. It was not questioned by either party that the words "S/87" in the contract were to be interpreted by reference to the rules and customs of the produce exchange board. Each party, without objection, introduced expert testimony as to the effect of the rules on the meaning of those words; and it is, at least, possible that the contract may have been otherwise qualified by them. Whether it was so or not could not have been determined without a knowledge of those rules and customs, together with a knowledge of the circumstances under which the contract was made. After the plaintiffs had been permitted to testify as to those circumstances, and that the contract was independent of the rules of the board, the proffered evidence on the part of the defendant as to the same matters should have been admitted. I think the judgment and order should be reversed and a new trial granted.

We concur: Belcher, C. C.; Fitzgerald, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial granted.

DE HAVEN, J.—I concur in the judgment upon the ground last discussed in the opinion of Commissioner Vanclief. Upon the other points I express no opinion.

LORD v. THOMAS.

No. 14,336; August 1, 1891.

27 Pac. 410.

Unlawful Detainer—Jurisdiction of Superior Court.—In an action by a landlord against his tenant for $183 rent due under a lease, and, as a second cause of action, for the restitution of the same premises, which were alleged to have been unlawfully detained after the expiration of a subsequent lease thereof, with damages for such unlawful detention, judgment was rendered for the rent demanded ($183), but restitution of the premises was denied. Held, that the superior court had jurisdiction to render the judgment in question, though it was for less than the jurisdictional amount ($300) of such court, since the relief demanded in prayer of judgment was within the jurisdiction of the court. Following Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349.

APPEAL from Superior Court, Stanislaus County; William O. Minor, Judge.

Action by William J. Lord against Stephen Thomas for unlawful detainer and for rent. Judgment was rendered for plaintiff for $183, but restitution of the premises was denied. Defendant appeals. Affirmed.

The complaint alleged for a first cause of action that "on or about the 11th day of May, 1887, plaintiff's predecessor of the lands and premises hereinafter described had leased, demised, and let the same unto said defendant at the monthly rental of $9 per month, for each and every month, to be paid monthly; under which lease said defendant was holding said premises when this plaintiff became the owner of and seised in fee of the same on the 28th day of April, 1888, when said lease, by the mutual consent of plaintiff and defendant, was continued from month to month at the said rental up to the 20th day of January, A. D. 1890. That there is now due plaintiff from defendant, on account of said lease, the sum of one hundred and eighty-three dollars. That defendant has not paid the same. That the land and premises herein referred to are situate in the county of Stanislaus, state of California, and described as follows, to wit: Commencing at

the N. W. corner of the N. E. quarter of sec. No. 33, T. No. 3 S., R. No. 10 E., Mt. D. M.; thence east 417½ feet; thence at right angles south 208½ feet; thence at right angles west 417½ feet; thence at right angles north 208½ feet, to place of beginning,—containing two acres of land." For another and separate cause of action against defendant, and in favor of plaintiff, the complaint alleged that "on or about the 20th day of January, A. D. 1890, the said plaintiff, by written lease made on or about the said day at the said county of Stanislaus, leased, demised, and let to the said Stephen Thomas, of the said county of Stanislaus, the premises situate, lying, and being in the said county of Stanislaus, state of California, and described as follows, to wit: Commencing at the N. W. corner of the N. E. quarter of section No. 33, township No. 3 south, range No. 10 east, Mt. D. M.; thence east 417½ feet; thence at right angles south 208½ feet; thence at right angles west 417½ feet; thence at right angles north 208½ feet, to place of beginning,—containing two acres of land. To have and to hold the said premises to the defendant for the term of three months from the 20th day of January, A. D. 1890, at the monthly rent of ten dollars, payable in equal monthly installments in advance. That by virtue of said lease said defendant Stephen Thomas went into possession of said premises, and still continues to hold and occupy the same. That the term for which said premises were demised as aforesaid terminated on the 20th day of April, 1890, and that the said defendant holds over and continues in possession of said demised premises without the permission of the said plaintiff, and contrary to the terms of said lease. That the said plaintiff since the expiration of the term for which said premises were demised, to wit, on the 22d day of April, 1890, made demand in writing of the said defendant to deliver up and surrender to him or his agent, Joseph Lord, the possession of said premises. That more than thirty days have elapsed since the making of said demand, and the defendant has refused and neglected for the period of thirty days after said demand to quit the possession of said demanded premises, and still does refuse. That the monthly value of the rents and profits of the said premises is the sum of ten dollars." The prayer of the complaint was as follows: "Wherefore the said plain-

tiff prays judgment for the sum of $183 for the restitution of said premises, and for damages for the rents and profits of said premises, and that such damages may be trebled as damages for the occupation and unlawful detention and holding over of the same, amounting to the sum of $10 per month, besides costs of suit." Judgment by default for the relief asked was set aside on defendant's motion, with leave to defendant to file an answer, and, after trial by the court, judgment was rendered as above stated.

P. J. Hazen for appellant; T. A. Caldwell and Stonesifer & Minor for respondent.

PER CURIAM.—This case cannot be distinguished in principle from that of Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349, and on the authority of that case the judgment must be affirmed.

HOME OF CARE OF INEBRIATES v. REIS, Treasurer.

No. 13,741; August 6, 1891.

27 Pac. 310.

Mandamus—Setting Aside Submission.—Where, on an application for a writ of mandate against a city treasurer, the supreme court, after the cause is submitted, concludes that the constitutionality of certain acts must be determined, which questions have not been argued, the submission will be set aside, and an opportunity for argument thereof will be afforded.

APPLICATION for writ of mandate by the Home of the Care of the Inebriates against Reis, as treasurer of the city of San Francisco.

Tilden & Tilden for petitioner; John H. Dwist and George Flournoy, Jr., for respondent.

PER CURIAM.—This cause was submitted upon an argument which raised but a single question, viz., whether the act of the legislature, approved March 17, 1876, was repealed by

the act of 1889. Upon mature consideration, the court has concluded that a writ of mandate cannot be awarded without determining other questions, viz.: The constitutionality of the acts of April 7, 1870, and March 17, 1876; and whether the treasurer of San Francisco, in view of the provisions of section 82 of the consolidation act, can be compelled to pay any unaudited claim. These questions ought not to be decided without argument, and the submission of the cause is therefore set aside, in order that such argument may be had.

PHELPS v. BROWN et al.*

No. 13,277; August 7, 1891.

27 Pac. 420.

Vendor and Vendee—Rescission—Refunding Deposit.—Plaintiff agreed with one N. and wife to exchange lands, and advanced $500 of the purchase price. N. gave a receipt for the money, and indorsed thereon: "Trade to be finished within two weeks from this date, or this deposit to be forfeited without recourse. Title to prove good, or no sale, and this deposit to be returned." An attachment against plaintiff's husband had been levied on her property, which she refused to procure discharged. N. abandoned the trade, and returned the money to defendants, who had negotiated the exchange of lands for N. Held, that the deposit remained in the hands of defendants as money had and received to plaintiff's use.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

S. G. Phelps sued J. E. Brown and others to recover money had and received for plaintiff's use. Judgment for defendants and plaintiff appeals. Reversed.

T. H. Laine and Laine & Hatch for appellant; Crandall & Biddle for respondents.

BELCHER, C.—It appears from the findings in this case that in June, 1887, one Norton and wife owned a tract of land

*For subsequent opinion in bank, see 95 Cal. 572, 30 Pac. 774.

in Santa Clara county, which was encumbered by a mortgage for $9,000, and the plaintiff, a married woman, owned a house and lot in the city of San Jose. The Nortons wished to exchange their land for the lot of plaintiff, and to negotiate the exchange they employed the defendants, who were real estate agents doing business in San Jose as partners under the firm name of Brown & Ensign, and orally agreed to pay them $500 as a commission if the exchange should be made. The proposition of the Nortons was that they would convey their land to the plaintiff for $20,000, and in payment thereof she should assume and pay the mortgage on the land, and should convey her lot to them for $6,500, and pay to them the balance of $4,500 in cash when the deeds should be executed. This proposition was put in writing and given to the defendants, and they delivered it to the plaintiff. She was willing to accept the proposition and make the trade if she could realize $6,750 for her lot, and not otherwise. The defendants then agreed to pay her $250 out of their commissions when the trade should be consummated. This arrangement was satisfactory, and she thereupon drew her check on a local bank for $500 payable to the Nortons, and handed the same to the defendants as a deposit or first payment. The defendants on the same day gave the check to the Nortons, who executed a receipt therefor, closing with the words: "Trade to be finished within two weeks from date, or this deposit to be forfeited, without recourse. Title to prove good, or no sale, and this deposit to be returned." A few days later the defendants handed back to the plaintiff her check, and she thereupon gave to them in place of the check $500 in money, which they at once paid over to the Nortons. Subsequently it appeared from the abstract of title furnished by the plaintiff that an attachment, issued in an action against her husband, had been levied on her property; and on learning this the Nortons refused to accept her deed, or to carry out the proposed exchange, unless she would have the attachment removed. She offered to give him a warranty deed, but refused to procure the discharge of the attachment. The Nortons were ready and willing to complete the trade, and tendered a deed of their property to the plaintiff, but she never offered to convey to them an unencumbered title to her property, and never tendered or offered to pay the balance of the purchase money.

Thereupon the Nortons abandoned the trade; and without the knowledge of plaintiff, and without any directions as to the disposition to be made of the money, returned the $500 to the defendants, and the latter returned to them their receipt, with an indorsement thereon in these words: "Money returned and their receipt is canceled. Brown & Ensign. July 25, 1887. We agree to release the signers of this receipt from any expense, legal or otherwise. Brown & Ensign." There are further findings as follows: "That when the trade was finally abandoned by the Nortons they were no longer entitled to retain the $500 as part of the purchase money. That the defendants, on receiving the $500 from the Nortons, took their place as to the money, and assumed all liabilities as to the plaintiff that the Nortons had incurred. That the oral agreement on the part of the plaintiff to forfeit the $500 paid, on failure to comply with the terms of the oral agreement to purchase of the Nortons, was valid, and she was not entitled to recover it back when she refused to complete the purchase." Judgment was entered that the plaintiff take nothing by her action, and that the defendants recover their costs. From that judgment the plaintiff appeals.

The action was brought to recover the $500 paid to the defendants, as above stated, as money had and received by them to the plaintiff's use. The respondents contend that the judgment was right and should be affirmed, because, as the plaintiff paid the money as a forfeit, and then failed to complete the trade by offering to convey an unencumbered title to her property, and to pay the balance of the purchase money, she could not have recovered the money back from the Nortons, and hence had no cause of action against them. This contention cannot, in our opinion, be sustained. The plaintiff could have maintained an action against the Nortons to recover the money; and their only defense, if any they had, would have been a counterclaim for damages: Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749. And the liability of the defendants is shown by the finding that, when they received back the $500, they took the place of the Nortons as to the money, and assumed all their liabilities to the plaintiff. This finding is not questioned, and its correctness seems to be admitted. It follows, therefore, we think, that the plaintiff

was entitled to maintain this action against the defendants, and that the judgment was improperly entered against her. We advise that the judgment be reversed and the cause remanded.

We concur: Vanclief, C.; Fitzgerald, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

TIBBETTS et al. v. CAMPBELL, Judge.

No. 13,996; September 5, 1891.

27 Pac. 531.

Mandamus to Judge.—Mandamus will not Lie to Compel the sustaining of a motion for judgment made by petitioner in an action in the trial court, and to permit him to prove certain allegations of his complaint, appeal being the proper remedy, if such rulings be erroneous.[1]

Application by Tibbetts and others for mandamus to compel John L. Campbell, judge of the superior court, to receive certain evidence in a pending suit. Writ denied.

Luther C. Tibbetts for petitioners.

PER CURIAM.—The affidavit in this case does not state facts sufficient to entitle the petitioners to a writ of mandate directing the respondent to do any of the things which it is alleged that he has refused to do. The overruling of petitioners' motion for a judgment in their favor in the case of Tibbetts et al. v. The Riverside Banking Company et al., and the refusal to allow the plaintiffs therein to prove certain matters alleged in their complaint, were decisions of questions of law arising during the trial. If there was any error in such rulings, the petitioners were afforded a plain, speedy, and adequate remedy by an appeal from the final judgment rendered in the action. Application for writ denied.

[1] **Cited** in a note in 98 Am. St. Rep. 902, on when mandamus is the proper remedy against public officers.

MARSH v. HENDY (LANGLEY et al., Interveners).

No. 14,147; September 19, 1891.

27 Pac. 647.

Swamp Land — Application Before Segregation.—The swamp lands granted to the state are not subject to application for purchase until they have been segregated to the state by a United States survey, and an application filed prior to such segregation confers no rights on the applicant.

Swamp Land.—Constitution, Article 17, Section 3, providing that state lands which are "suitable for cultivation" shall be granted only to actual settlers, applies to swamp lands granted to the state when such lands are suitable for cultivation, and can be reclaimed and cultivated by an actual settler.

APPEAL from Superior Court, Tulare County; William W. Cross, Judge.

Action by Archibald Marsh against John H. Hendy to determine a contest as to the right to purchase from the state certain swamp lands. J. R. Langley and others intervene. Judgment being entered in the court below against both plaintiff and defendant, each moved for a new trial, which being refused, they appeal from the judgment and orders denying the motions. Affirmed.

Freeman & Bates for appellant; Garber & Bishop for respondent; W. B. Wallace for interveners.

BELCHER, C.—This is an action to determine a contest, arising in the state land office, as to the right to purchase from the state a certain section of swamp and overflowed land in Tulare county. During the pendency of the action other parties were permitted to intervene for the purpose of showing that neither the plaintiff nor defendant was entitled to make the purchase. After trial the court below found, among other things, that when the defendant made his application to purchase the section in controversy the land had not been segregated as swamp and overflowed land by authority of the United States; that when the plaintiff made his application to purchase the section the land was, and ever since had been,

suitable for cultivation; that neither the plaintiff nor defendant had ever been an actual settler upon the land; and, as a conclusion of law, that neither of them was entitled to purchase the same from the state. Judgment was accordingly so entered. Both parties moved for a new trial, and their motions were denied, and they then appealed from the judgment and orders denying their motions. Since the appeals were taken several other cases involving all the questions arising herein have been considered and passed upon by this court: See Wren v. Mangan, 88 Cal. 274, 26 Pac. 100; Fulton v. Brannan, 88 Cal. 454, 26 Pac. 506; McNee v. Lynch, 88 Cal. 519, 26 Pac. 508; Buchanan v. Nagle, 88 Cal. 591, 26 Pac. 512; Belcher v. Farren, 89 Cal. 73, 26 Pac. 791. These cases are decisive of this, and upon their authority we advise that the judgment and orders appealed from be affirmed.

We concur: Temple, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

FIRST NATIONAL BANK OF SANTA MONICA v. KOWALSKY.

No. 14,765; October 12, 1891.

27 Pac. 783.

Appeal—Failure to File Transcript.—An appeal will be dismissed after the time allowed for filing a transcript has elapsed, if no transcript has been filed, nor attempt made to prepare one, and no sufficient excuse is offered for failure to do so.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by the First National Bank of Santa Monica against H. I. Kowalsky. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

A. Courey & Miller for appellant; H. I. Kowalsky for respondent.

PER CURIAM.—Motion to dismiss appeal. The transcript has not been filed, nor have any steps been taken to prepare a transcript, although the time allowed for that purpose has fully elapsed, and no sufficient excuse is offered for failure to comply with the rule. Appeal dismissed.

McCROSKEY v. LADD.*

No. 13,297; December 1, 1891.

28 Pac. 216.

Vendor and Vendee—Deed by Corporation—Marketable Title. A vendor agreed to convey a good and sufficient title or refund any payments made. Defendants refused to accept the deed offered. It appeared that one of the deeds relied upon by the vendor in the chain of title was executed by the president and secretary of an incorporated association under their private seals, and recited that they were authorized at an annual meeting of the association to make deeds. It was held that since both the recital in the deed from the association and the absence of the corporate seal failed to show any authority from the board of directors to convey, the plaintiff did not offer a good paper title within the meaning of the contract.

Vendor and Vendee—Title Based on Statute of Limitations.—A purchaser is not bound to accept a title resting on the statute of limitations, or to take the risk of determining from facts which he might learn dehors the record whether or not the statute of limitations can successfully be pleaded against an adverse claim.[1]

Vendor and Vendee—Defects in Title.—Defendants are not called upon specifically to point out defects in a title where the contract does not require it, and especially where the flaw is in a deed from a dissolved corporation.

Vendor and Vendee.—The Flaw in the Deed from the Corporation relates directly to the authority of the officers to act, and is not a defect which can be cured by section 1207 of the Civil Code, which provides that any instrument affecting real property recorded prior to January 30, 1873, shall be deemed to impart notice of its contents

*For subsequent opinion in bank, see 96 Cal. 455, 31 Pac. 558.

[1] Cited in the note in 132 Am. St. Rep. 1023, 1024, on what is a marketable title.

to subsequent purchasers and encumbrancers, notwithstanding any defect, omission or informality in the execution of the instrument or in the certificate of acknowledgment or in the absence of any such certificate.

Vendor and Vendee—Marketable Title.—A vendor may be able through litigation to establish a perfect title, and yet be unable to enforce a contract for the sale of his land.[1]

APPEAL from Superior Court, San Benito County.

Action on a promissory note by McCroskey against Ladd and another. Judgment for defendants. Plaintiff appeals.

J. L. Hudner and M. T. Dooling for appellants; N. C. Briggs for respondents.

PATERSON, J.—On August 25, 1887, the plaintiff agreed in writing to sell and convey certain lots to the defendants on the following terms: "$650 at this date, and the balance

[1] **Cited** and approved in McDermott v. Chatfield, 18 Cal. App. 500, 123 Pac. 540, where plaintiff sued for the return of his deposit, given upon a contract made just before the great San Francisco fire, immediately after which event he had given notice of cancellation. The court held that the destruction of the records made it impossible for the defendants to furnish a merchantable title within the contract time, so that notice of defective title was not necessary to enable the plaintiff to sue.

Approved in McDermott v. Chatfield, 18 Cal. App. 500, 123 Pac. 540, where the plaintiff, having made a deposit for the purchase of property in San Francisco under a contract giving him thirty days in which to satisfy himself as to the title, sued to recover back the deposit, the great fire occurring two days after the contract having destroyed all the records whereby he might so satisfy himself.

Cited, but not approved to the utmost, as holding that a title is not marketable if, by reason of counsel declining to approve it, a loan company declines to take a mortgage on the property: Howe v. Coates, 97 Minn. 401, 114 Am. St. Rep. 723, 4 L. R. A., N. S., 1170, 107 N. W. 404.

Cited in Fagan v. Hook, 134 Iowa, 385, 105 N. W. 157, to support the dictum that "though a good title has been held by some decisions to be one not absolutely bad, the great weight of authority is to the effect that the expression means a marketable title, one that can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money."

Cited in note in 38 L. R. A., N. S., 14, 18, on what is a marketable title.

($5,850) within sixty days from this date. And said McCroskey, upon receiving said payments, agrees to make a deed of said property to said persons, and convey title to said premises to them; and, if said persons fail to make said payments as herein named, they shall forfeit all right to said property, and all right to all payments made herein. If said title is not sufficient and good, then said moneys shall be refunded." Thereupon the defendants executed and delivered to the plaintiff a promissory note for $650. Although not required to do so by the terms of the contract, the plaintiff furnished to the defendants an abstract of his title, which the latter submitted to their attorney, who, after examination, reported that it did not show title in the plaintiff. Defendants notified plaintiff of the fact, whereupon the latter furnished another abstract, which was submitted by consent to another attorney, agreed upon by the parties, for his opinion, but the plaintiff did not agree to be bound thereby. After examining the abstract, said attorney, Archer, gave an opinion in writing that the title was not good. This opinion was handed to the plaintiff, but it did not point out, nor did the defendants ever state to the plaintiff, wherein the title was defective. The second abstract referred to was furnished after the expiration of the sixty days named in the contract. Soon after the opinion of Archer was given to the plaintiff, the defendants demanded of the latter the possession of the note referred to. After said demand plaintiff tendered to McClay, one of the defendants herein, a deed of grant, bargain and sale, in the usual form, describing the property, and demanding payment of the sum of $6,500. The demand was refused, whereupon this action was commenced to recover the amount named in the note.

One of the deeds in the chain of title upon which the plaintiff relies was a deed from the San Justo Homestead Association, a corporation created under the laws of this state, to one Sowle. This deed was executed by the president and secretary of said association, and attested by their individual seals. No corporate seal was attached thereto. The deed recites that to facilitate the sale of certain lots "said association did, at their annual meeting held at Gilroy, California, on the 20th day of January, 1869, pass the following, to wit: 'Resolved, that the president and secretary of the San Justo Homestead

Association, at the time of any sale of said lots, be, and are hereby, authorized and empowered in the name and on behalf of said association to make, execute and acknowledge a good and sufficient deed of conveyance of grant, bargain and sale to the purchaser or purchasers of any lots sold, on receipt of the purchase price thereof." It is not essential to the validity of a deed executed by a corporation that it should contain a recital of the authority under which it is made, unless such recital is made necessary by statute: 1 Devlin on Deeds, sec. 343. But where such authority is recited, it will be deemed to be the only authority upon which the officers executing the deed acted. The corporate seal is prima facie evidence that the officers executing the deed had been authorized by the board of directors to act. "It is settled law in this state that a corporation can only act, can only speak, through the medium prescribed by law, and that is its board of trustees": In re La Solidarite Mut. Ben. Assn., 68 Cal. 394, 9 Pac. 453. The recital in the deed to Sowle indicates that the authorization of the president and secretary came from the stockholders at an annual meeting of the association. At least it does not show that the authority came from the board of directors, and the absence of the corporate seal indicates that the board never acted upon the matter. The authority of the officers to execute the deed must affirmatively appear: Kahn v. Supervisors, 79 Cal. 399, 21 Pac. 849; Koehler v. Iron Co., 2 Black, 715. In cases of this kind, a title, to be good, must be one which is "free from litigation, palpable defects and grave doubts; should consist of both legal and equitable titles; and should be fairly deducible of record": Turner v. McDonald, 76 Cal. 180, 18 Pac. 262. The question as to whether or not the vendor has acquired a perfect title by adverse possession is not to be considered. The purchaser is entitled to a good paper title, sufficient in law, "and was not bound to accept title resting upon the statute of limitations, or take the risk of determining from facts which he might learn dehors the record whether or not the statute of limitations could be successfully pleaded against the adverse claim": Benson v. Shotwell, 87 Cal. 56, 25 Pac. 249.

It is claimed by appellant that the respondents were estopped from claiming any advantage by reason of these defects, because they were not pointed out at the time the

objection was made to the title; that, if they had been, the defects might have been cured. The contract does not fix any time or place any duty upon the respondents with regard to an examination into the title or notice to the appellant of any defects which might be discovered therein. The respondents were entitled to rely on the record as they found it. Assuming, however, that it was the duty of the respondents under this contract to point out any imperfections in the title discovered by them, the record shows that the plaintiff was not injured by their failure to give him notice of the defect referred to. The only object in requiring such notice in any case is to give the vendor an opportunity to correct the defect. The court found that the San Justo Homestead Association was dissolved by a decree of the county court in 1877. It would have been impossible, therefore, for the plaintiff to have removed the imperfection in his title before the time named for the completion of the purchase. Conceding, furthermore, that the only question is whether the plaintiff's title was in fact good, and that the authority of the officers of the corporation to execute the deed might have been shown by the minutes of the board of directors, it is sufficient to say that no such showing was made. Proof of the absence of the corporate seal cast upon the plaintiff the burden of showing that the president and secretary were authorized by the board of directors to execute and deliver the deed: Koehler v. Iron Co., supra.

It is claimed by appellant that the irregularity in the execution and acknowledgment of the deed was cured by the provision of section 1207 of the Civil Code. That section provides that any instrument affecting real property, recorded in the office of the county recorder prior to January 30, 1873, shall be deemed to impart "notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or in the absence of any such certificate." But the imperfection we have been considering is not a mere defect, omission or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, but is one which relates directly to the authority of the officers to act.

At the conclusion of their brief, counsel for appellant state that respondents' objections "go to the very foundation of appellant's title," and, if approved by the judgment of this court, will obscure the title to property valued at millions of dollars in and about the town of Hollister. The fear thus expressed, however, is groundless. A vendor may be able through litigation to establish a perfect title, and yet be unable to enforce a contract for the sale of his land. We do not determine in this action whether the plaintiff's title is or is not good in fact. The stipulation in the contract that, "if said title is not sufficient and good, then said money paid shall be refunded," must be held to mean that, if there should appear to be such uncertainty about the title arising from the record as to affect its marketable value, the plaintiff would return the money or note which he had received from the defendant. The title must be free from "litigation, palpable defects and grave doubts." If it is not, "a court of equity will not compel its acceptance, and cast upon him the risk of litigation, and the embarrassment of a questionable title": Townshend v. Goodfellow, 40 Minn. 319, 41 N. W. 1056.

Judgment affirmed.

Garoutte, J., concurred.

ROSE v. FOORD.*

No. 14,060; December 3, 1891.

28 Pac. 229.

Limitation of Actions.—Where a Seller of Stocks Fails to Deliver them, limitations against his implied promise to refund the purchase money begin to run from the date of his notice to the purchaser of inability to deliver.

Limitation of Actions—New Promise.—After such notice, verbal promises to deliver the stocks when he could will not take the case out of the statute of limitations, by reason of Code of Civil Procedure, section 360, which provides that no promise is sufficient for such purpose unless in writing, signed by the party to be charged thereby.

*For subsequent opinion in bank, see 96 Cal. 152, 30 Pac. 1114.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge. Reversed.

Action by L. J. Rose against James Foord, administrator, to recover money had and received. Judgment for plaintiff. Defendant appeals.

Lee & Scott for appellant; Chapman & Hendrick for respondent.

FOOTE, C.—This action was brought to recover $4,000 and interest, against the administrator of the estate of N. R. Vail, deceased, by L. J. Rose. A judgment was obtained, payable in due course of administration, from which and an order denying a new trial this appeal is taken. The cause of action, as stated in the complaint, grew out of an agreement on the part of the deceased, in his lifetime, to sell and deliver to the plaintiff, within a reasonable time, certain shares of stock, and the certificates thereof, in a mining corporation. Before the mining corporation was incorporated, or any shares of stock or certificates were issued, the plaintiff paid the sum of $4,000 as the purchase price for one-half of the decedent's (N. R. Vail's) share of the stock which he was to have, after the same should be issued. It became impossible for Vail to deliver the shares or certificates therefor, which he had promised to the plaintiff, by reason of the issuance and service of an injunction granted by a court of competent jurisdiction in the state of New York. The plaintiff made a demand in writing some time after he had paid his money, and about the 30th of July, 1883, for the shares of stock and certificates thereof, which he had purchased, and which he had become entitled to receive from Vail. On the 6th of August of that same year, Vail by letter admitted to the plaintiff the former's inability to comply with his contract and deliver the stock or certificates, and make good the proposed sale to the plaintiff. It is evident that, had the plaintiff elected so to do, he might, at the last-mentioned date, have rescinded the contract, a reasonable time having been given for its completion, and the consideration therefor having clearly failed.

But, so far from promptly proceeding to stand on such legal right, the plaintiff seems rather to have preferred for several years after that date, and until the death of Vail in 1888, to rely on the contract as made originally, and to insist on its performance, encouraging Vail to suppose that such was the plaintiff's wish; and Vail in turn appearing, from time to time, up to within a few months of his death, verbally promising to get hold of the stock and certificates, and make his sale good. The right of action accrued to the plaintiff on the 6th of August, 1883, when the defendant by letter confessed his inability, and declined thereby to deliver the stock and certificates thereof. Such being the state of affairs, the plaintiff's cause of action, as stated in the complaint, arose from the failure on the part of Vail to comply with his implied promise to pay the purchase price for the stock back to the plaintiff, on the failure of the consideration of the contract of sale and delivery. The statute of limitations of two years on such a verbal promise to pay money had and received would commence to run on the 6th of August, 1883, when the consideration failed.

We perceive no force in the suggestion advanced by the appellant that the complaint states a cause of action based upon any other than a cause of action resting upon the breach of this implied promise just adverted to. When the evidence and findings are examined, even at a glance it is seen that the cause of action declared on was never understood by any of the parties at the trial to be other than what we have here stated. The date when the cause of action became barred was several years before the presentation of the claim to the administrator of Vail, who refused to pay it, and also before the institution of this suit, and before the death of Vail. There are several other points made and argued extensively and exhaustively, but, in the view that must be taken of this matter, we cannot see how they can be of any avail either to discuss or determine. The verbal promises to deliver stock when it could be done do not appear to be sufficient to take the case out of the statute of limitations of two years: Code Civ. Proc., sec. 360. For these reasons, after a very thorough and painstaking examination of the record and authorities cited, we are satisfied that the

judgment and order refusing a new trial should be reversed, and we so advise.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

PEOPLE v. McNULTY.*

No. 20,659; December 12, 1891.

28 Pac. 816.

Ex Post Facto Law—Prisoners Awaiting Execution.—Penal Code, section 1217, provides that the warrant for the execution of a prisoner sentenced to death must appoint a day for the execution, "which must not be less than thirty or more than sixty days from the time of judgment." Section 1227 imposes on the sheriff the duty of executing criminals. Section 1229 directs that the execution must take place in the county where judgment is rendered. Laws of 1891, page 272, amended these sections by providing that the day of execution "must not be less than sixty or more than ninety days from the time of judgment," and that the warrant must also direct the sheriff to deliver the prisoner to the warden of one of the state prisons, on which officer is imposed the duty of executing criminals, and directing that the execution take place in the prison to which the criminal is delivered. Held ex post facto as regards prisoners awaiting execution, because imposing greater punishments by the confinement in the state's prison than the acts repealed.[1]

Ex Post Facto Law—Unconstitutionality in Part.—Where it is evident that the legislature in passing such statute intended it to apply the new punishment alike in all cases of murder, past as well as future, and would not have passed it except as an entirety, and that its partial enforcement would produce effects which the legislature would never have sanctioned, the whole act must be declared unconstitutional.[2]

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*For other opinions in this case, see 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

[1] **Cited** with approval in State v. Rooney, 12 N. D. 151, 95 N. W. 515, as following the definition of ex post facto laws given by Justice Washington in Calder v. Bull, 3 Dall. 390, 1 L. Ed. 648.

[2] Disapproved in State v. Rooney, 12 N. D. 158, 95 N. W. 518, where, a similar law being in discussion, the court takes the contrary view and expresses satisfaction at the California court having revised its own view upon a rehearing of the cited case: 93 Cal. 427, 29 Pac. 61.

Wilson & Troutt, Carroll Cook, J. E. Foulds and Wm. Hoff Cook for appellant; W. H. H. Hart, attorney general, for the people.

BEATTY, C. J.—The defendant was accused by information of the crime of murder, alleged to have been committed in March, 1888. In August, 1888, he was convicted of murder in the first degree, and, in accordance with the law as it then stood, was sentenced to be hanged by the sheriff in the county jail. On appeal to this court the judgment of the superior court was affirmed: 26 Pac. 597. But before a remittitur had issued our attention was called to certain amendments to the Penal Code, enacted by the last legislature, pending the appeal, changing the method and time for executing capital sentences, which, it is contended, are inapplicable to the case of this appellant, because they are, as to him, ex post facto, but which at the same time have the effect of repealing the old law, under which alone he could have been executed, the result being, as claimed, that in consequence of a blunder of the legislature he and all others in his situation must go free of all punishment. For the purpose of considering and determining this important question the judgment of affirmance was vacated and a reargument ordered. The case having been again argued and submitted, we are now to decide upon the effect of the legislation referred to.

The question involved is no less than this: Whether, since the date fixed for the taking effect of the amendatory statute—May 30, 1891—capital punishment can be inflicted in any case of murder, however atrocious, committed prior to that date; and whether, in a case like this, where a judgment of death, free from error, had been entered, but not executed, prior to said date, any punishment whatever can be inflicted. The gravity of this question will be better appreciated when it is understood that there are, according to the statement of the attorney general, no less than eighteen convicted murderers whose fate depends upon its solution, and who, if it is determined in favor of the contention of the appellant, must be turned loose upon society, unless this court shall, as his counsel suggests, reverse the judgments, with or without reason,

and remand the cases for new trials, in the hope that the juries before whom they may be again tried will, as in their discretion they might, impose the lighter penalty of imprisonment for life, in order to prevent the most deliberate murderers from going absolutely unpunished. We do not, however, feel at liberty to resort to such an evasion, or to convey such a suggestion to the superior court. We have already determined that the judgment in this case is free from error; that the appellant was duly and legally convicted and sentenced to die, according to the law of the land as it existed at the date of the judgment and at the date of the murder. Other cases must be decided according to the same rule and the same law. If in such cases we find, as we have found in this case, that the judgments are regular and valid, we must so declare; and if it is true, as contended, that the sentence in this case cannot be executed by reason of the repeal of the only law under which it could have been executed, and that the appellant must go free, so must all others in his situation. With a thorough appreciation, therefore, of the consequences to flow from our decision, we proceed to consider the case.

It is to be premised that from an early period in the history of California the crime of murder—the unlawful killing of a human being with malice aforethought—has been divided into two degrees—murder of the first and murder of the second degree. Without undertaking to state fully the distinction between the two crimes, it is sufficient for our purpose to say that the first degree includes those murders which are marked by deliberation or cruelty, or which are committed in the perpetration or attempt to perpetrate certain enumerated felonies of the gravest character. It has been the unvarying expression of the legislative will, sustained by the sentiment of the people of California, that such murders deserve the penalty of death by hanging, unless (according to a comparatively recent enactment) the jury trying the case, in their discretion, expressly determined by their verdict that the defendant may be punished by imprisonment in the state prison for life: Pen. Code, sec. 190; People v. Welch, 49 Cal. 174. In this law there has been no change since the commission of the homicide of which the appellant was convicted. It re-

mains, with the modification referred to, as it has remained for almost half a century, the settled policy of the state. There has never been manifested any intention on the part of the legislature or desire upon the part of the people that the death penalty in aggravated cases of murder should be abolished. On the contrary, the very latest expression of the legislative will is in favor of its continued infliction, with what counsel for appellant contends are added penalties and greater severity, resulting from the different manner prescribed for carrying it into execution. The recent amendments to the Penal Code, the effects of which we are to consider, do not present the first instance of changes made by the legislature in the manner of conducting the execution of capital sentences. Formerly, and for a long time, executions were public; but afterward the law was so amended as to require the execution to be conducted within the jail, and with comparative privacy. It has never been contended, so far as we are aware, that this amendment was void with respect to previous offenses on the ground of being ex post facto, although we think it would be shown by reasoning no less logical, and upon grounds no more fanciful, than are contained in the argument of counsel here, that execution within the walls of a jail before sunrise (Holden v. Minnesota, 137 U. S. 491, 34 L. Ed. 734, 11 Sup. Ct. Rep. 143), and in presence of the few persons designated by statute, or invited by the sheriff, would to many convicts be vastly more terrible than execution in public, in the light of day, in the presence of all who choose to attend, including friends, relatives and sympathizers. If this is so, or even if it may reasonably be supposed to be so, then, according to the argument, such an alteration of the law would be ex post facto, and void as to all previous offenses, though it was held otherwise in the case last referred to.

It must be admitted, however, that the supreme court of the United States found and declared a distinction, material in its view, between the statute of Minnesota—considered in the Holden case—and the statute of Colorado, under which the Medley case arose: Ex parte Medley, 134 U. S. 160, 33 L. Ed. 835, 10 Sup. Ct. Rep. 384. In that case Medley was convicted of murder, and sentenced to be hanged in the manner and at the time and place prescribed by a statute which did not go into effect, although passed, before he committed the murder. Pending the execution, and while in the custody of the warden

of the penitentiary, he sued out a writ of habeas corpus in the supreme court of the United States, where it was held that the statute referred to prescribed a different and severer punishment than that provided in the statute existing at the date of the murder; that it was, therefore, as to him, an ex post facto law, such as the states are by the federal constitution forbidden to pass (article 1, section 10), and incapable of enforcement. It was also at the same time held that since, according to the decision of the Colorado courts, the amendatory act had gone into effect, and thereby necessarily repealed the former law regulating the execution of capital sentences, there remained no law under which the petitioner could be punished, and he was accordingly discharged. Evidently, if our amendatory statute makes, as is contended, substantially the same changes in our law as were effected by the statute of Colorado, the same results must follow; that is to say, the sheriff cannot execute the judgment against the appellant, for the law authorizing him to act has been repealed; and, if the judgment is modified so as to conform to the new regulation, the supreme court of the United States will, as soon as the appellant is committed to the custody of the warden of the penitentiary, discharge him upon habeas corpus. In other words, we have here a federal question; a question of the validity of a state law, depending upon its conformity to the behests of the constitution of the United States; a question upon which the decisions of the supreme court of the United States are of binding and conclusive authority. It becomes necessary, therefore, to carefully examine and compare the two laws—that of Colorado and that of California—in order to determine whether this case falls within the principle of the Colorado case, and is governed by it.

The Colorado statute (Laws 1889, p. 118) is quoted at page 163, 134 U. S., page 837, 33 L. Ed., and pages 384 and 385, 10 Sup. Ct. Rep.. According to the contention of the petitioner in that case, there were no less than twenty variances between the statute in force at the date of the murder and that under which he was sentenced, all of which he claimed to be changes to his prejudice and injury, and therefore ex post facto. The court, however, found it unnecessary to examine all these specifications, being satisfied that in two important particulars the law was infected with the vice imputed

to it. According to the old law, every person convicted of murder in the first degree was to suffer death by hanging, at such time as the court should direct, not less than fifteen nor more than twenty-five days after sentence, unless for good cause the governor should prolong the time. Pending the execution the prisoner was to be kept in the county jail, under the control of the sheriff of the county, who was the officer charged with the execution of the sentence. Solitary confinement was neither authorized by the former statute nor was its practice in use in regard to prisoners awaiting the punishment of death. By the new statute the judge passing sentence of death was required to issue a warrant directed to the warden of the penitentiary, appointing and designating therein a week of time within which such sentence must be executed, such week so appointed to be not less than two nor more than four weeks from date of sentence, commanding said warden to do execution of the sentence imposed upon some day within the week of time designated in the warrant. This warrant was to be delivered to the sheriff of the county, whose duty it was made to proceed to the penitentiary within twenty-four hours, and there deliver the prisoner and warrant to the warden, who thereupon was required to keep the convict in solitary confinement until the infliction of the death penalty; "and [the statute proceeded] no person shall be allowed access to said convict, except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations." By section 3 of the act it was further provided that the warden should fix the particular day and hour of the week designated in the warrant for carrying out the sentence, and should invite to be present at the execution the sheriff of the county where the conviction was had, the chaplain and physician of the penitentiary, one practicing surgeon—resident of the state—the spiritual adviser of the convict, if any, and six reputable citizens of the state of full age. Besides these official witnesses no person was to be allowed at the execution, except the executioners necessary for the assistance of the sheriff; and all were forbidden, under heavy penalties, from divulging to any person, including the prisoner, the hour or day of his death. The court held that the provision for solitary confinement in the penitentiary between sentence and execution

and the provision requiring the prisoner to be kept ignorant and in suspense as to the exact time within a whole week when he might be called upon to die were substantial additions to the punishment previously prescribed, and rendered the act invalid as an ex post facto law. As to other points upon which the court failed to express an opinion we can only conjecture what their decision would have been if they had deemed it necessary to discuss them.

For the purpose of comparing the law of this state existing at the time the appellant committed the murder of which he was convicted with the amendments made or attempted by the act of 1891 (Laws 1891, p. 272), we shall quote sections 1217, 1227 and 1229 of the Penal Code, as they existed at the date of the crime, and in their amended form:

THE OLD LAW.

"Sec. 1217. When judgment of death is rendered, a warrant, signed by the judge and attested by the clerk under the seal of the court, must be drawn and delivered by the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of judgment."

"Sec. 1227. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the district attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make an order that the sheriff execute the judgment at a specified time. The sheriff must execute the judgment accordingly."

"Sec. 1229. A judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The sheriff of the county must be present at the execution, and must invite the presence of a physician, the district attorney of the county, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any per-

sons, relatives, or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

THE ACT OF 1891.

"Sec. 1217. When judgment of death is rendered, a warrant, signed by the judge, and attested by the clerk, under the seal of the court, must be drawn and delivered to the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than sixty nor more than ninety days from the time of judgment, and must direct the sheriff to deliver the defendant, within ten days from the time of judgment, to the warden of one of the state prisons of this state for execution; such prison to be designated in the warrant."

"Sec. 1227. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, must order the defendant to be brought before it, or, if he is at large, a warrant for apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make an order that the warden of the state prison to whom the sheriff is directed to deliver the defendant shall execute the judgment at a specified time. The warden must execute the judgment accordingly."

"Sec. 1229. A judgment of death must be executed within the walls of one of the state prisons designated by the court by which judgment is rendered. The warden of the state prison where the execution is to take place must be present at the execution, and must invite the presence of a physician, the attorney general of the state, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives, or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons

than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

A comparison of these sections will demonstrate all the substantial changes—if there are any such—which the legislature has attempted to make in the old law. It will readily be seen that our statute differs materially from that of the state of Colorado. The day and hour of the execution are not to be kept secret from the prisoner under the new provisions any further than under the old; and the same persons, including those whom he is allowed to designate, are to be present at the execution. Neither is there any express provision for keeping him in solitary confinement during the time which is to elapse between the date of his delivery at the prison and the time of execution; and, if the opinion of the supreme court of the United States in Medley's case had rested solely upon their construction of the meaning of the term "solitary confinement," we should have experienced no difficulty in distinguishing that case from the case before us. But in truth the context of the Colorado statute shows that the words "solitary confinement" were not used therein in their strict sense. The language of the act is as follows: "Who shall keep such convict in solitary confinement until infliction of the death penalty; and no person shall be allowed access to said convict, except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with the prison regulations." It is scarcely necessary to say that a prisoner who may be visited in prison by his counsel, physician, spiritual adviser, and the members of his family, subject only to prison regulations (all prisons, including county jails, being governed by some reasonable regulations), is not kept in solitary confinement in the strict or usual sense of that term. And this consideration was no doubt pressed upon the attention of the court, for in their opinion, delivered by Mr. Justice Miller, they say: "The qualifying phrase in this statute is but a small mitigation of this solitary confinement, for it expressly declares that no one shall be allowed access to the convict except certain persons, and these are not admissible unless their access to the prisoner is in accordance with prison regulations, prescribed by the board of commissioners of the penitentiary under section 2553 of

the General Statutes of Colorado, in force since 1877. This section declares that 'the board of commissioners of the penitentiary shall make such rules and regulations for the government, discipline and police of the penitentiary, and for the punishment of prisoners confined, not inconsistent with law, as they deem expedient.' What these may be at any particular time is unknown. How far they may permit access of counsel, physicians, the spiritual adviser, and the members of his family, is a question in their discretion, which they exercise by general rules, which may be altered at any time so as to exclude all these persons, and thus the prisoner be left to the worst form of solitary confinement. Even the statutory amelioration is a very limited one. By the words 'his attendants,' in the statute, is evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists. They may be forbidden by prison regulations, however, from holding any conversation with him. The attendance of the counsel can only be casual, and a very few interviews—one or two, perhaps, are all that he would have before his death; and that of the physician not at all, unless he was so sick as to require it; and the spiritual adviser of his own selection, and the members of his family, are all dependent for their opportunities of seeing the prisoner upon the regulations of the prison. The solitary confinement, then, which is meant by the statute, remains of the essential character of that mode of prison life as it originally was prescribed and carried out, to mark them as examples of the just punishment of the worst crimes of the human race." These extracts from the opinion of the court show that less importance was attached by the court to the punishment implied in the words "solitary confinement" than to the necessary or usual results of removing a prisoner from the county jail to the state prison, viz., that he can there be visited by counsel and members of his family less frequently, and only at greater inconvenience, and subject to prison regulations. If we are correct in this construction of the opinion, it follows that this case falls within the principle decided, for in this state, as in any other state, it must inevitably happen that in most instances the counsel and family of a prisoner will have less convenient access to him in the state prison than when confined in the county jail.

Besides this point of resemblance between the changes made in the Colorado law, and that attempted in our own, there is another. By the old law, in Colorado, the convict was to be executed not less than fifteen nor more than twenty-five days after sentence. By the amended law he was to be executed not less than fourteen nor more than twenty-eight days after sentence. In other words, his days of grace might be abridged one day, or his days of dread and apprehension might be prolonged for three days. No doubt these were among the twenty particulars in which the amendatory act was claimed to be in violation of the constitution of the United States; but the court did not express an opinion on this point, and we have no means of knowing how it would have been decided if the case had turned upon it.

By reference to section 1217 of the Penal Code above quoted, and the proposed amendment, it will be seen that the effect of the amendment, if valid, would be to change the period within which the execution must take place from not less than thirty nor more than sixty days to not less than sixty nor more than ninety days after judgment, the result of which is that under the amendment a convict might be kept alive and in dread and apprehension of a painful and ignominious death for thirty days longer than he could have been so kept under the old law. This change, also, it is strenuously argued, and apparently not without authority to sustain the contention, makes the law ex post facto. For, in the first place, it is said that, although by a vast majority of persons condemned to die on the scaffold any postponement of the date of execution would be eagerly welcomed as a boon, there may be some men to whom it would be an aggravation of their suffering. And, in the next place, it is contended that, even if this were not so, the principle that courts and legislatures may be allowed to change the punishment of crimes ex post facto in such manner as in their opinion renders the penalty lighter cannot be admitted without destroying the value of the constitutional guaranty, because there could be no certainty that the legislative or judicial discretion would always be wisely and mercifully exercised; and neither the legislator nor the judge is to be allowed to measure the feelings of the culprit by his own. In short, the cases have gone to the extent of holding that a law which changes the punishment of past

offenses in any manner whatever except by remitting a separable portion of the penalty previously prescribed, i. e., by reducing the amount of the fine, the number of stripes, the term of imprisonment, etc., is necessarily void as to all such offenses. It is unnecessary, however, to cite or to criticise the cases in which this matter has been considered by courts whose decisions do not bind us as authority, when we have a decision of the supreme court of the United States which is clearly in point.

We have seen that under the amendments of 1891 a person convicted of murder in the first degree and sentenced to death must within ten days thereafter be delivered to the warden of the state prison, and be confined by him for from fifty to eighty days in said prison. If it is in the power of the legislature to add to the penalty of death by hanging a previous imprisonment in the penitentiary for eighty days, the term might, under the same power, be extended to years. And even with respect to a short detention in the state prison this is what is said in the Medley case by the supreme court of the United States (134 U. S. 168, 169, 33 L. Ed. 839, 10 Sup. Ct. Rep. 386, 387): "Instead of confinement in the ordinary county prison of the place where he and his friends reside, where they may, under the control of the sheriff, see him and visit him, where the sheriff and his attendants must see him, where his religious adviser and his legal counsel may often visit him, without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this court has judicially decided in Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89, 5 Sup. Ct. Rep. 935, Mackin v. United States, 117 U. S. 348, 29 L. Ed. 909, 6 Sup. Ct. Rep. 777, Parkinson v. United States, 121 U. S. 281, 30 L. Ed. 959, 7 Sup. Ct. Rep. 896, and United States v. De Walt, 128 U. S. 393, 32 L. Ed. 485, 9 Sup. Ct. Rep. 111, is itself an infamous punishment, and is there to be kept in 'solitary confinement,' the primary meaning of which phrase we have already explained."

Various other grounds are insisted upon by counsel as being each in itself sufficient to render the amendments of 1891 unconstitutional; as, that a convict confined in the state prison awaiting execution would, under the general law, as construed in the Arras Case, 78 Cal. 304, 20 Pac. 683, be compelled to

do hard labor during his confinement; and that he would, under the operation of sections 673, 674, of the Penal Code, become civilly dead, and be deprived of all civil rights, etc. We do not think there is anything in these points. There is nothing in the doctrine of the Arras case to sustain the conclusion that a prisoner confined in the penitentiary while awaiting execution could be compelled to labor, and sections 673, 674, could not be held applicable to such a case. But upon the other grounds above mentioned, and in conformity to the decision in the Medley case, to the authority of which we are compelled to yield obedience, we feel constrained to hold that neither this appellant nor any other person in his situation can be punished under the amendments of 1891, because as to him and all such persons such amendments are ex post facto and void.

This conclusion, however, does not dispose of the case, for the appellant was not sentenced to be executed in the manner prescribed by the amendments of 1891, but in the manner provided by the law in force at the date of the murder—that is to say, by the sheriff in the county jail; and the question is whether that sentence can be enforced. Clearly, it cannot be enforced if the old law authorizing the sheriff to execute capital sentences has been repealed. Such was the conclusion reached in the Medley case, and it is sustained by a long and unbroken line of decisions in the English and American courts as to the effect of the repeal of penal statutes. The exact question to be determined, therefore, is whether the old law has been repealed, and this depends upon the further question whether the amendments of 1891 are in force for any purpose, or to any extent; for, if they are not absolutely void as to all offenses, future as well as past, they took effect on the sixtieth day after the act was approved; and the moment they took effect the old law, at least in so far as it differed from the new, ceased to exist, for the mode of amending laws prescribed by our constitution was followed in this case by re-enacting the various sections of the Penal Code as amended, and under all the decisions of this court the moment such an amendment takes effect so much of the old law as is not re-enacted is repealed. There is, therefore, we repeat, no escape from the conclusion that, if the amendments of 1891 took effect on the 30th of May, 1891, for any purpose or to any extent, the old

law at the same time ceased to exist. Upon this point the contention of the appellant is that, as to all offenses subsequently committed, the act is valid and free from objection, and that as to them it must be held to be in force, with the consequence necessarily involved that the old law stands repealed. The attorney general, on the contrary, contends that since, by the terms of the amendments, they include past as well as future offenses, and since it is for many reasons apparent that the legislature intended to apply the same punishment to past as to future offenses, and since, in short, the amendatory act cannot have the effect which the legislature intended it to have, but only a partial effect, followed by a consequence so plainly at variance with the legislative will that it cannot be supposed that the law in its existing form would have been passed if such consequence had been foreseen, the attempted amendments should be declared absolutely and wholly void, and the old law in force. There can be no doubt that it was the intention of the legislature to apply the new method of execution in all cases of murder, past as well as future. The terms of the act sufficiently indicate this intention, and there is nothing outside of its terms to suggest anything different; for it cannot be supposed that a legislature which makes no change in the definition of murder or its degrees, which preserves the penalty of death by hanging for murder of the first degree, merely designating a different officer, time, and place for executing the sentence, could possibly have intended to grant a complete amnesty to all persons standing convicted of murder in the first degree and awaiting execution. Still less can it be supposed that there was an intention to set apart the period of sixty days between the passing and the taking effect of the law during which murders might be perpetrated by means of torture, poison, lying in wait, or any other cruel and deliberate means, or in the perpetration or attempt to perpetrate arson, rape, robbery or burglary, with absolute certainty that the perpetrator could not be punished in the manner, and the only manner, which the people of California and their representatives have ever deemed proper and adequate to such offenses. There is nothing fanciful about this statement. We know that it was a legal impossibility under the law as it stood between March and May, 1891, to complete the process against a murderer within sixty days if he availed himself of his legal rights,

and we know by reference to the cases of Medley and Savage, 134 U. S. 160–177, 33 L. Ed. 841, 842, 10 Sup. Ct. Rep. 384, 389, that in the state of Colorado two men at least, and we know not how many others, availed themselves of the opportunity presented by the interval between the passage and taking effect of the Colorado act to commit cruel and deliberate murders, which, as the law was subsequently construed, they must be presumed to have known could not be punished with death, nor punished at all, unless a jury, by paltering with their oaths, should find them guilty of a crime of lower grade than that which they had committed.

Proceeding, then, upon the assumption that it was the intention of the legislature to make the amendments of 1891 applicable to past as well as future offenses, and that they must have known that there were or might be past as well as future offenses to which they would apply, we come next to consider whether the law must be held valid as to one class of cases, though necessarily invalid as to the other. This is not a federal question, and, so far as it may have been involved in the conclusion reached in the Medley case, we are not controlled by that decision. It clearly appears, however, that the question was not there considered, the only question argued being the construction of the Colorado act, whether ex post facto or not: 134 U. S. 162–169, 33 L. Ed. 837–840, 10 Sup. Ct. Rep. 384–387. The supreme court of Colorado had already decided that the new act was in force, and necessarily that the old act was repealed, and upon this purely state question the supreme court of the United States merely adopted the conclusion of the state court. We are therefore free to consider it, uncontrolled by any superior authority. The general doctrine upon this subject is clearly and briefly stated at pages 213 and 214 of the sixth edition of Cooley's Constitutional Limitations as follows: "A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offenses, which endeavors to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of ex-

isting contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which, therefore, would have no legal force except such as the law itself would allow. In any such case the unconstitutional law must operate so far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it should be held valid as to some cases and void as to others." It will be seen from the latter part of the above quotation that the learned author admits, or rather asserts by implication, that there may be cases in which a law which, as to part of its intended purpose, can have a constitutional operation, will nevertheless be held wholly void, when it is evident that it would not have been passed except as an entirety, and would, by being given a partial operation, defeat the general purpose of the legislature. It will also be observed that the proposition is stated in immediate connection with, and as an exception to, the doctrine as to the construction of statutes which, if allowed a retrospective operation, would impair the obligation of contracts, or would be ex post facto laws. The evident caution with which this rational exception to the general rule is announced by Judge Cooley is perhaps due to the fact that few, if any, adjudicated cases can be found in which it has been asserted or applied; but it is clear that he perceived the necessity that might arise for its application. And besides, the exception, as stated, is in substance precisely the same, and rests upon the same principle of statutory construction, as that applied in case of an act some sections or clauses of which are unconstitutional, while others are free from that objection. The rule in such cases is that if, when the unconstitutional clauses or sections are stricken out, that part of the act which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained: Cooley's Constitutional Limitations, 6th ed., p. 211. But if the different parts of the act are so mutually connected with

and dependent upon each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, and connected must fall with them: Id., pp. 211, 212. These propositions are sustained by abundant authority cited in the notes under Judge Cooley's text. And there is no reason apparent why the admitted doctrine respecting statutes invalid as to connected conditional and dependent clauses and sections should not equally apply to a statute invalid as to connected, conditional and dependent purposes and objects. The controlling consideration in both cases must be the same, viz., that the courts will not enforce a statute which cannot operate as it was intended by the legislature to operate, when it is apparent that its partial enforcement will produce effects which the legislature would never have sanctioned. That this is a sound, wholesome, and even necessary principle of construction, we cannot doubt. And we are equally satisfied that it is, as intimated by Judge Cooley, applicable to a statute prescribing or altering the penalties for criminal offenses.

Firmly as we are impressed with the soundness of these views, we are not deterred from applying them to the case before us by the fact that we have not found any decisions of other courts to the same effect, nor by the fact that we are cited to a number of cases in which an opposite conclusion seems to have been reached. It is to be observed, however, with respect to the cases referred to, that most of them differ very materially from this case. In many of the instances in which new enactments have been held to repeal by implication former laws, under which alone past offenses could be punished, the changes in the law with respect to the definition or classification of offenses, or by way of mitigating the penalties of the offense, were so marked and radical as to furnish substantial grounds for holding that the legislature had intended to declare that the former law was not fit to be enforced. A notable instance of this sort is found in the celebrated Hartung case (Hartung v. People, 22 N. Y. 95, 26 N. Y. 167). Mrs. Hartung poisoned her husband at a time when the punishment prescribed by law for murder was death by hanging, to be in-

flicted within a short time after sentence. Subsequently the law was so altered as to prescribe as the penalty for the same offense imprisonment in the penitentiary at hard labor for one year, after which the convict was to be hanged only in case the governor should in his discretion issue his warrant directing the execution of the death sentence. The result of the various proceedings in the case and of the two appeals was that Mrs. Hartung was discharged upon the ground that as to her offense the new law was ex post facto, and the old law repealed without any saving clause as to past offenses. But besides the various special reasons impelling the court to that conclusion, which have no application to this case, there was this additional and sufficient reason why the court could not hold the new law wholly inoperative: Not only was the old law so changed by the amendatory act as practically to substitute life imprisonment for death by hanging as the penalty for murder, but the death penalty was absolutely abolished in some cases, where before it had been provided. Under such circumstances, the court might well say that the enactment of the new statute was equivalent to a legislative declaration that the old law was not fit to exist. And this, it seems, is the principle upon which repeals by implication, in case of the revision of the penal statutes, rests. By the revision the legislature is supposed to have declared that the former law is not fit to exist: Flaherty v. Thomas, 12 Allen, 435. The principle is intelligible enough and reasonable enough when applied to a revision which changes the classification or definition of offenses, or which sensibly mitigates the penalties formerly imposed upon the same offenses. But where, as in the case before us, the definition of the offense is in no wise changed; where the punishment, instead of being mitigated, is, according to the argument, enlarged; and where the manifest and only object of the legislature was to change the place, the time, and the officer for carrying out the sentence of death—it seems little short of absurd to hold that this amounts to a legislative declaration that the former law is not fit to exist. We think, on the contrary, that there is here no such declaration, and that we may safely hold, as we do hold, that, since the act of 1891 cannot operate as it was intended to operate, and since the partial operation it might have would defeat the evident intention of the legislature, and produce consequences which

if foreseen, would have prevented the passage of the amendments, the whole act is unconstitutional and void; that it never took effect, and the old law remains in force. This conclusion is to some extent opposed to that reached by this court in People v. Tisdale, 57 Cal. 104; but the ground of our decision herein was not discussed or at all considered in that case, and, since no vested rights are dependent upon the former decision, it cannot be regarded a binding precedent. The judgment and order appealed from are affirmed.

We concur: McFarland, J.; Sharpstein, J.; Paterson, J.

HARRISON, J., Dissenting.—I regret that I am unable to concur in the foregoing opinion and judgment. I concur in that portion thereof which holds that the effect of the amendments of 1891 is to make such a change in the punishment prescribed for murders committed prior to their enactment as to bring them within the definition of an ex post facto law, and, therefore, that the punishment therein prescribed cannot be inflicted upon the defendant. I do not, however, concur in the conclusion deduced therefrom that we must, for this reason, conclude that the legislature did not intend that such result should follow, or that, if it had known that such would have been the result, it would not have enacted the amendments. Neither do I concur in the construction given to the amendments that the punishment for offenses committed while the former law was in force is so connected with that prescribed for future offenses that we must hold that the legislature did not intend that offenses thereafter committed should be punished in the mode prescribed by the amendments, unless prior offenses could be also punished in the same manner. The rule which generally obtains in the construction of statutes is that when a statute is re-enacted with certain additions, then for the first time made a part of the law, the provisions of the new act which are reproduced from the old and re-enacted are deemed to be mere continuations of the former law, rather than a repeal and a re-enactment thereof, and that the portions of the former statute which are omitted from the new are repealed, and are from that time to be regarded as never having been a part of the law, while the new portions are to be regarded as then for the first time presenting the rule of conduct, and are limited in their operation and effect

to acts thereafter to be done. It was held in Billings v. Harvey, 6 Cal. 381, that section 24, article 4, of the constitution of this state, providing that "no law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be re-enacted and published at length," prescribed a different rule of construction, and that by virtue of this constitutional provision "the re-enactment creates anew the rule of action, and, even if there was not the slightest difference in the phraseology of the two, the latter alone can be referred to as the law, and the former stands to all intents as if absolutely and expressly repealed." This rule of construction was afterward reaffirmed by the court in Billings v. Hall, 7 Cal. 3; Morton v. Folger, 15 Cal. 284; Clarke v. Huber, 25 Cal. 594; Bensley v. Ellis, 39 Cal. 313; People v. Tisdale, 57 Cal. 104. A similar ruling was made in Texas (State v. Andrews, 20 Tex. 230) and in Alabama (Wilkinson v. Ketler, 59 Ala. 306).

Section 325 of the Political Code provides: "Where a section or part of a section is amended it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." If the rule of construction applied in the foregoing cases is derived from the constitution, as was held in Billings v. Harvey, it would seem that the legislature could not by statute change this rule. In Central Pac. R. R. Co. v. Shackelford, 63 Cal. 268, the decision appears to have been made in accordance with the rule laid down in this section of the Political Code, although it is not referred to in the opinion, nor is there any reference to the above decisions, with which it is apparently in conflict. It is, however, unnecessary for the purposes of this case to determine whether the rule laid down in Billings v. Harvey or that prescribed by the Political Code is to prevail, inasmuch as the portions of the statute which are retained in the amended sections do not call for so much consideration as does the effect of those portions then first enacted, compared with the portions of the sections omitted from the re-enactment. Under well-established rules of construction the portions of the original sections which are omitted from the amendments are

deemed to have been thereby repealed, and the portions then for the first time enacted are held to constitute the rule of action in reference to the subject matter therein expressed. All laws are prospective in their operation unless they contain express provision for making them retroactive; and laws prescribing punishment for crimes are essentially limited to future violations of the law creating the offense. Section 3 of the Penal Code declares that "no part of this code is retroactive, unless expressly so declared."

The proposition contended for by the appellant is that by these amendments the punishment imposed for the offense has been changed to his disadvantage, as well as increased, and that, as the legislature provided no saving clause in the statute for offenses committed prior to its passage, as was done in the statute under consideration in People v. Gill, 7 Cal. 356, and as was provided in section 6 of the Penal Code at the time of the enactment of that code, there can be no punishment inflicted upon him for his offense, either under the old statute, for the reason that the punishment thereby prescribed has been repealed, or under the new, as that prescribes a punishment different from and greater than was provided when the offense was committed, and, being ex post facto, is therefore unconstitutional and void. The effect of the repeal of a criminal law is to prevent any further action thereunder. By its removal from the statute-book the court is devested of all authority to try the accused, or, if tried, to pronounce judgment against him. It is immaterial at what stage of the proceeding the repeal takes place. If before trial, the defendant cannot be tried; if after conviction, and before judgment, he cannot be sentenced; if after judgment, and before sentence, he cannot be punished. Unless the proceedings have passed into final judgment, and beyond the necessity of any further action by the court, a repeal of the statute which makes the act an offense, or which defines the punishment for the offense, deprives the court of all further jurisdiction. Whenever the court is called upon to take any step or do any act which directly or in its consequences will have the effect to punish the defendant for any act done by him, it must find its authority therefor in a statute then existing and in force; and if, subsequent to the commission of the offense, the punishment prescribed therefor has been changed, without any saving clause

for previous offenses, the court is devested of all authority to impose such punishment, and must punish the offender in conformity with the amended statute, unless restricted therefrom by constitutional provisions. "The repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it, pending at the time of the repeal. There can be no legal conviction unless the act is contrary to law at the time it is committed, nor can there be a judgment unless the law is in force at the time of the indictment and of the judgment": Sedg. St. & Const. Law, p. 130. Mr. Bishop says: "No proceedings can be carried on under a law which, being repealed, is not existing to give authority to the court; consequently, if the common or statutory law which authorized a prosecution and conviction for a specific offense is repealed, or expired before final judgment, the court can go no further with the case. Even if a verdict has been rendered against the prisoner, sentence cannot be pronounced, and he must be discharged": Bish. St. Crimes, sec. 177. "When an act of parliament is repealed it must be considered, except as to transactions past and closed, as if it had never existed": Dwar. St. 160. The repeal of a penal statute takes away all right of action for the recovery of the penalty therefor: Norris v. Crocker, 13 How. 429, 14 L. Ed. 210; Breitung v. Lindauer, 37 Mich. 230. "The repeal obliterates the statute as if it had never been passed, and obliterates the penalties as if they had never existed": Rood v. Railroad Co., 43 Wis. 153. "The repeal of the law imposing the penalty is of itself a remission": Per Taney, C. J., in Maryland v. Railroad Co., 3 How. 552, 11 L. Ed. 722. In Yeaton v. United States, 5 Cranch, 281, 3 L. Ed. 101, Chief Justice Marshall said: "After the expiration or repeal of a law no penalty can be enforced or punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In 1860 the legislature of New York passed an act changing the punishment for murder, and repealing the prior law for the punishment of that offense, by virtue of which it was held by the court of appeals of that state that the legislature had so interfered with the laws for the punishment of the crime of murder that a particular class of offenders, embracing the prisoner, could not be punished at all. The effect of this was

that all murders which had been committed prior to the passage of that act, and for which the trial, conviction, and sentence had not taken place, escaped all punishment: Hartung v. People, 22 N. Y. 95, 26 N. Y. 167. In State v. Daley, 29 Conn. 272, the defendant was convicted in July, 1860, of manslaughter committed in May of that year. By an act passed by the legislature which took effect after the commission of the offense, and prior to the trial and conviction of the defendant, a change was made in the punishment of manslaughter from imprisonment in the state prison for a term not less than two nor more than ten years, to imprisonment in the state prison or county jail for a term not exceeding ten years. The court held that, as the statute was prospective only, without any saving clause, the defendant could not be punished, for the reason that the effect of the repeal without any saving clause was to leave no sanction or punishment for that crime applicable to previous offenders. "The effect of such repeal was, for the most obvious reason, that the law as to any proceedings under it which were not past and closed must be considered as if it had never existed, and therefore furnishes no authority after its repeal for the commencement of any proceedings, or for the further prosecution of any which had been before commenced. Hence it has been often decided that, if a provision of either the statutory or common law, which authorizes a prosecution and conviction for a specific offense, is repealed before final judgment, the court can proceed no further with the case, and that sentence cannot be pronounced, even although a verdict has been rendered against the prisoner, and he must therefore be discharged." In State v. Campbell, 44 Wis. 529, the defendant was charged with the embezzlement of public funds committed in 1876. Before his trial under the charge the legislature revised the law of the state relative to embezzlement by an act which went into effect January 1, 1878. Upon a motion in arrest of judgment the court held that, inasmuch as the revising act contained no saving clause, authorizing a prosecution for offenses already committed, there is no law which would authorize or sustain a judgment on the verdict saying: "It is true, by this construction all offenses committed by public officers under the Revised Statutes of 1858, which were not prosecuted to judgment prior to the new law taking effect, will go unpunished, but this con-

sequence must rest upon the legislature, and not the courts. The legislature could easily have avoided such a result by enacting a proper saving clause in chapter 340. As the law now stands, we must hold that there is no statute under which it can be punished. We may deplore this, but it is beyond our power to help it without a violation of well-settled principles of law."

In United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153, the defendant had been indicted for an offense committed against the naturalization laws, and while the matter was pending on appeal to the supreme court Congress passed an act embracing the whole subject of frauds against the naturalization laws. The supreme court, in disposing of the question, held that, although there was no express repeal of the law under which the defendant was indicted, yet as the provisions of the subsequent act were repugnant to those of the former, it operated as a repeal, saying: "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed." In Flaherty v. Thomas, 12 Allen, 428, the statute imposing the penalty for an offense was changed after the commission of the act to such an extent that it was held by the court to be a repeal of the former statute, and that the defendant could not be punished, saying: "All criminal statutes are limited in effect, and usually in terms, to future offenses. The establishment of a new rule of punishment is of itself a legislative declaration that the previous rule is not fit to exist, and therefore shall not be applied to any case unless the legislature, in order to prevent offenses already committed from going unpunished, provides that such offenses shall continue to be punished according to the previous laws. It is clearly settled by authority that, in the absence of any such provision, the old law cannot be resorted to after the new law has taken effect for the punishment of an offense committed before the passage of the latter, even if the defendant has been already convicted by the verdict of a jury." In People v. Tisdale, 57 Cal. 104, it was held that an amendment in 1880 to section 607 of the Penal Code, by which the punishment for an offense was changed from a "fine not exceeding one thousand dollars, or imprisonment in the state prison not

exceeding two years," to a fine "not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not exceeding two years, or by both," operated as a repeal of the former statute, and that, as the defendant was not charged with a violation of the statute as it stood after the amendment, he could not be punished under an information filed for a violation of the law before it was repealed: See, also, Commonwealth v. Kimball, 21 Pick. 373; Commonwealth v. McDonough, 13 Allen, 581; Kring v. Missouri, 107 U. S. 221, 27 L. Ed. 506, 2 Sup. Ct. Rep. 443; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531; In re Petty, 22 Kan. 477; Lindzey v. State, 65 Miss. 544, 7 Am. St. Rep. 674, 5 South. 99; Shepherd v. People, 25 N. Y. 406; Ratzky v. People, 29 N. Y. 124.

By omitting from the sections as amended the provisions authorizing the judgment to be executed by the sheriff, and within the county where the conviction was had, the legislature deprived the court of all power to authorize such execution by the sheriff, or within the county jail, and also took from the sheriff all capacity to execute the judgment. The amendments had the effect to obliterate from the statute all the provisions that were not re-enacted, as completely as if they had never formed a part thereof. The omitted portions became as if they had never existed, and the new portions are to be construed as if none had preceded them.

It is urged by the attorney general that, in case it shall be held that the sections as amended provided for a greater punishment than the original sections, such provision would be unconstitutional and void, and that, therefore, the amended sections are themselves unconstitutional and inoperative to effect a repeal of the former sections; and it is held in the prevailing opinion that, because it is unconstitutional to apply the punishment prescribed by the amendments to one convicted of an offense committed prior thereto, the amendments are thereby affected with such an unconstitutional element that it defeats their operation in reference to offenses subsequently committed. It is undoubtedly a correct proposition that the provisions of a statute will not be affected by a subsequent unconstitutional act of the legislature, and that a clause in such act, repealing all other acts which are inconsistent therewith, will not affect the prior statute. The uncon-

stitutional act is to be regarded as wholly void, and inoperative, even for the purpose of displacing or overruling that for which it is sought to be made a substitute: Ex parte Davis, 21 Fed. 396; Tims v. State, 26 Ala. 165; State v. Crozier, 12 Nev. 300; State v. Hallock, 14 Nev. 202, 33 Am. Rep. 559; In re Petty, 22 Kan. 489; Campau v. Detroit, 14 Mich. 276. It is also a fundamental rule of construction that a statute is not to be declared unconstitutional unless it be clearly so, and also that, "if the statute is susceptible of two constructions, one of which is consistent and the other inconsistent with the restrictions of the constitution, it is the plain duty of the court to give it that construction which will make it harmonize with the constitution, and comport with the legitimate powers of the legislature": People v. Frisbie, 26 Cal. 139. The legislature is not presumed to have intended to pass an unconstitutional act, and, unless the act clearly falls within some express prohibition of the constitution, or is beyond the power of the legislature, it is the duty of the courts to uphold, rather than to set it aside. All laws are presumed to have been passed with deliberation, and with a knowledge on the part of the legislature of the existing laws, and any statute, purporting either expressly or impliedly to repeal an existing law, is deemed to have been passed with the intent on the part of the legislature to make such change.

There is nothing in the terms of the sections as amended in 1891 which is repugnant to any provision of the constitution or beyond the powers of the legislature to adopt. It will not be disputed that it was entirely competent for the legislature, when originally defining crimes and their punishment, to provide that judgment of death should in all cases be carried into effect by the warden of a state prison and within its walls. Its power in this respect was not exhausted by its first exercise. It has the same power to-day to prescribe a different punishment for any crime that it originally had to fix the punishment therefor. It was within the power of the legislature to abolish capital punishment. It could even grant an amnesty for all murderers by simply repealing the section providing for their punishment; and, however much we may conjecture that the legislature would not purposely free a criminal from punishment, or however much we may think that it did not in the present case intend to grant an amnesty

for any offense, we can only determine its intent by what it has said. "The result may or may not be conformable to the actual intent of those who passed the latter statute. We can only ascertain the legal intent of the legislature by the language which they have used, applied, and expounded conformably to the settled and well-known rules of construction": Commonwealth v. Kimball, 21 Pick. 376. "If the legislature by the act of 1860 carelessly or unintentionally repealed the law punishing the prisoner's crime, that is no reason why reasonable and well-settled principles of construction should be disregarded for the purpose of punishing it under that act": Shepherd v. People, 25 N. Y. 411. "It is not a sufficient answer to the difficulty to say that the members of the legislature did not probably intend to grant impunity to offenders in the situation of the prisoner. They did intend to abrogate as to her and as to all persons in the same situation the former punishment, and that design they effectually carried out. They intended also that such offenders should be punished in another way, but this they could not effect on account of the constitutional inhibition": Hartung v. People, 26 N. Y. 170. "The legislature might have inserted in the repealing act a saving clause, which would have prevented the defendant's escape, if they had seen fit to do so. If they omitted it through mistake, the court cannot correct the mistake. Nor have we a right to decide that the omission was by mistake": Commonwealth v. McDonough, 13 Allen, 585. The legislature has done no act, nor has it given utterance to any expression, which authorizes the inference that it did not intend the amendments to be operative unless they applied to all offenders; and I know of no other mode of ascertaining the intention of the legislature in reference to what it has enacted than the language of its act. The rules for the construction of statutes are simple, and do not vary with the subjects to which the statutes are directed. While the statement of the attorney general respecting the number of persons charged with murder who will be affected by the statute would have been properly presented to the legislature when that body had the act under consideration, it can have no weight with this court in construing the effect of the statute. If we should assume that the legislature knew that those persons would be affected by its action, and passed the amendments with such knowledge, or

that it enacted them in the belief that they would not affect such previous offenders, we must still concede that such legislation was within the powers of the legislature, and that we are not at liberty to set it aside because its effect is different from what we may infer that that body anticipated. If, on the other hand, we assume that the legislature enacted the amendments in the opinion or belief that there were no previous offenders to whom they could be made applicable, it merely results that the amendments were enacted without sufficient consideration or examination; and such has never been held a sufficient ground for disregarding the plain language of a statute. Whether we are to assume that the legislature acted advisedly or without consideration, I know of no rule of construction by which we are at liberty to investigate the extent of its knowledge, or the want of consideration it gave to its action, and therefore, in applying the well-settled rules of construction to the amendments under consideration, we are simply to determine whether the amendments themselves are by their terms inconsistent with the constitution. If an attempt is made to apply the law as found in these amendments to cases which are not within their terms, it results that in the instance in which such attempt is made there is but the not unusual case of an offense against society, for the punishment of which the law has not made adequate provision. It cannot be questioned that it was the intention of the legislature by the amendments under consideration to provide that all judgments of death should thereafter be executed within the walls of a state prison. It has specifically declared this intent in express language, and, if there had been no murder committed in this state prior to the passage of the act of 1891, the intent of the legislature as to the place of punishment would have been undoubted. By thus amending these sections of the Penal Code, it has as effectually shown its intent to repeal the former provisions for the place in which the punishment of death should be executed, as if it had shown its intention by abrogating those provisions in express language.

It is conceded in the argument on behalf of the people that, if the amendatory statute had contained a saving clause for the punishment of crimes committed prior to its passage, there would have been no constitutional objection to its validity. The omission of such saving clause cannot, however, make in-

valid a law which would otherwise be valid. The constitutionality of its provisions is to be determined by their own harmony with the constitution, and not by the effect which additional provisions would have had upon the subject matter to which the act is applied. The statute, as amended, is not in its terms unconstitutional. Its unconstitutionality does not spring from any provision which is contained therein, but arises only when it is sought to apply its provisions to cases which are not within its terms. This is not, however, a defect which is inherent in the statute, but is a want of power to apply the statute to cases for which it makes no provision, and results from the application of other principles of the constitution which are intended for the protection of individual rights, and which are equally sacred and potent as those which are made for maintaining government or for the punishment of crime. A law which it is within the power of the legislature to pass is constitutional, although it may be unconstitutional to apply it to acts or prosecutions had prior to its passage.

In the same clause of the constitution which prohibits the passage of ex post facto laws is the prohibition of laws impairing the obligation of contracts. The statute-books of the several states, as well as of this state, contain many laws of a general nature which violate this latter provision, and which have been held constitutional in their application to future transactions, although inoperative as to prior ones. Under the rule for amendment provided by the constitution, any section of the codes is to be amended by its re-enactment as amended. In civil matters no saving clause is required. The former law is held to have entered into the contract to such an extent as to be beyond the power of the legislature to deprive the parties to the contract of the rights thereby acquired; but in matters of criminal legislation, unless the saving clause is contained in the amended section, the state, as represented by the legislature, is deemed to have remitted the penalty incurred in the commission of the offense. The amended section is not unconstitutional, but it is unconstitutional to apply it to transactions had prior to its passage. "A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offenses, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct

for the citizen in future, would be void, as far as it was retrospective, but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control": Cooley Const. Lim., p. 213; Jaehne v. New York, 128 U. S. 189, 32 L. Ed. 398, 9 Sup. Ct. Rep. 70; State v. Amery, 12 R. I. 64; United States v. Hall, 2 Wash. C. C. 373, Fed. Cas. No. 15,285.

The principle contained in the prevailing opinion in this case leads necessarily to this result: either that any amendment to that portion of the Penal Code defining crimes and punishments which the legislature may enact without a saving clause for prior offenders is ipso facto unconstitutional, and without its power to enact, or that its validity is to depend upon the conjecture of the individuals who may be the members of this court respecting the intention of the individuals who may have been members of the legislature at the time the amendment was enacted. If the doctrine be correct that because a law which is prospective in its operation, and which in terms is consistent with the constitution, is unconstitutional as to future offenses because it cannot be applied to past offenses, it must follow that the court has imposed a restriction upon the legislature which is not found in the constitution. If, on the other hand, such law is to be declared unconstitutional whenever the members of this court shall be of the opinion that the legislature did not intend what it has expressly and unqualifiedly declared, the certainty of law is substituted by the conjecture or will of the court. "Misera est servitus ubi jus est vagum aut incertum." In none of the instances wherein similar legislation has been construed by the courts of other states has it been even suggested that such legislation was unconstitutional for the reason that its effect could not have been anticipated by the legislature; and, although the decisions of those courts have no binding authority upon us, yet, in a matter which involves only the determination of the proper rules of construction in criminal law, the unanimity of decision in other states is an authority of the most persuasive character. And the rule of construction is the same whether the statute to be construed has reference to the punishment of the highest crime defined in the law or to the slightest misdemeanor. These rules are as uniform for

all laws as is the constitutional prohibition against an ex post facto law.

The rule that a statute which is in part unconstitutional will be declared wholly so is applicable only when it can be seen from the act itself that the unconstitutional part is the "condition or consideration" upon which the other part was enacted, or that the two parts are so interdependent that one cannot exist without the other. If the different parts are separable, or if the subjects to which the act may have a constitutional application are separable from the others, it will not be declared unconstitutional. This rule was laid down with his usual clearness by Chief Justice Shaw in Warren v. Mayor, 2 Gray, 99, where he limits such result to a case where the parts of the statute "are so mutually connected with and dependent on each other as conditions and considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently." In the case of Fisher v. McGirr, 1 Gray, 21, 61 Am. Dec. 381, that able jurist had said "that, where a statute has been passed by the legislature under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of legislative power, or is repugnant to any provision of the constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act not obnoxious to the same objection will be held valid, and have the force of law." There is nothing in the statute under consideration indicating that the punishment of previous offenders according to its terms was a condition or consideration for providing that subsequent offenders should be so punished, nor is the punishment of these classes in any respect so interdependent that the one cannot exist without the other. The statute presents the not infrequent case of a law applicable to certain acts, but inapplicable to others by reason of the paramount law. The intention of the legislature, as expressed in its language, is that it shall be applicable to all cases, but this intention cannot be carried out as to certain cases by reason of a constitutional inhibition.

In Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067, a statute of the state of Texas provided for a tax upon every telegraphic message sent by any company doing business

within the state. The court held that the act was unconstitutional, in so far as it was applicable to messages sent out of the state, but valid as to those sent within the state, applying the same principles which had previously been held by it in the case of State Freight Tax, 15 Wall. 232, 21 L. Ed. 146: See, also, Steamship Co. v. Pennsylvania, 122 U. S. 339, 30 L. Ed. 1202, 7 Sup. Ct. Rep. 1118. In a similar case (Fargo v. Michigan, 121 U. S. 241, 30 L. Ed. 893, 7 Sup. Ct. Rep. 857) the court said: "The taxing law of the state was, therefore, valid as to the latter class of transportation, but with regard to the others it was invalid, because it was interstate commerce, and the state could lay no tax upon it."

In 1880 various acts were passed amending the sections of the Penal Code for the purpose of adapting them to the new constitution, many of which affected the punishment previously prescribed for offenses, but none of these acts contained any saving clause for prior offenses. In 1874 section 190 of the Penal Code was amended by giving to the jury the discretion to award punishment in the state prison for life instead of death, as the penalty for murder in the first degree: Amend. Code, 1873–74, p. 457. In 1889 section 261 of the Penal Code, defining rape, was amended by making the age of consent fourteen years, instead of ten: Stats. 1889, p. 223. In neither of these statutes was there any saving clause for prior offenses. Very many other sections of the Penal Code have been amended by the legislature without making provision for the effect of such amendments upon previous offenders. If I correctly apprehend the principles maintained in the prevailing opinion herein, any of these amendments to the Penal Code is unconstitutional if it can be shown that at the time of its enactment there were cases pending in court in which individuals charged with crime might have gone unpunished by reason of the statute in force when the crime was committed having been repealed by the amendment. The invalidity of the statute cannot depend upon the fact that the person then charged with the crime did not avail himself of such defense. The statute is to be tested by the conditions existing when it was passed; and, if it would at that time have been declared unconstitutional for that reason, it is equally so to-day, and its unconstitutionality can be invoked by anyone against whom it is sought to be enforced. If the amendments of 1891

are unconstitutional for the reasons given in the prevailing opinion, they could not be enforced against one who committed murder after their enactment, even though those whose crimes were committed prior thereto did not assert such unconstitutionality. If at the time of the amendment of section 190 in 1874, there were persons charged with murder prior to that date, that act, as it now stands upon the statute-book, must be construed unconstitutional, for the reason that it provided such a possible change for the punishment of an offender as to be within the inhibition of an ex post facto law. I do not think that such a conclusion can be maintained, and for that reason I cannot concur in the conclusion reached by the majority of the court in the present case.

In reaching the conclusion that the amendments to the Penal Code in 1891 have so changed the punishment for the offense of which the defendant was convicted that it cannot be imposed upon him, and that there is no existing law for the punishment of his offense, I have not failed to consider that the crime committed by him must go unpunished, but, however much this result may be regretted, it is not for this court to prevent it. The criminal, as well as the upright, is entitled to be protected in the rights guaranteed to him by the constitution. That instrument has been framed as the basis and limit of all legislation, and the lowest, as well as the highest, is entitled to its protection. It is one of the functions of this tribunal to prevent hasty or ill-considered legislation from infringing upon the limitations therein prescribed; and, however great might be our desire, we cannot avoid the responsibility of declaring such legislation inoperative, even though the effect of our decision be that crimes will go unwhipped of justice, or criminals be restored to society. "It is better that any criminal shall go unpunished than that any provision of the constitution shall be disregarded, or that the foundations of the criminal law shall be unsettled": Lindzey v. State, supra. "Though it is desirable that all offenders against our penal laws should be punished, yet it is better that one should occasionally escape than that the fundamental principles of the criminal law should be violated": Commonwealth v. McDonough, supra. In my opinion, the judgment of the court below should be affirmed; but inasmuch as, since it was pronounced, the legislature has so changed the law as to deprive

the court of the power to enforce its judgment, that court should be directed, upon the filing of the remittitur therein, to enter an order discharging the defendant from custody.

I concur in the foregoing opinion of Mr. Justice Harrison: De Haven, J.

I concur: Garoutte, J.

CHACE v. JENNINGS, Sheriff, et al.

No. 13,510; January 4, 1892.

28 Pac. 681.

Injunction—Sale of Lands on Execution.—In an action to restrain the sale of land under execution against plaintiff's grantor the court should continue the restraining order pending final determination, and it is an abuse of discretion to dissolve it upon the filing of an answer denying the allegations of the bill.

Injunction—Denials on Information—Dissolution.—Under Code of Civil Procedure, section 437, authorizing denials upon information and belief, such denials, while sufficient to raise an issue, will not justify the dissolution of a temporary injunction on the ground that the bill is fully denied by the answer.

APPEAL from Superior Court, Santa Cruz County; F. J. McCann, Judge.

Action by one Chace against Jennings, sheriff of Santa Cruz county, and others, for an injunction. Judgment for defendants. Plaintiff appeals. Reversed.

A. S. Kittredge for appellant; T. H. Laine and Z. N. Goldsby for respondents.

SHARPSTEIN, J.—The case is not materially different from Porter v. Jennings, 89 Cal. 440, 26 Pac. 965. As admitted by respondents' counsel, "it is against the same defendants. The purpose is to restrain the sale of the same premises, threatened to be sold by the defendant Jennings (as sheriff) under the same execution in favor of Mary A.

Cummings v. William N. Cummings." The only difference between that case and this is the party plaintiff. We think that case was correctly decided, and on its authority the order appealed from is reversed, with directions to the court below to issue the injunction as prayed for by plaintiff pending the final determination of the action upon its merits.

We concur: De Haven, J.; McFarland, J.

In re KREISS.*

No. 13,320; January 28, 1892.

28 Pac. 806.

Arbitration—Stay of Judgment.—On Motion of One of the parties to an arbitration to vacate the award, the court below, concluding that the submission to arbitration was not a statutory submission, refused to entertain the motion, and ordered the judgment entered, and all proceedings under it to be perpetually stayed. Held, that the ruling was proper, it appearing that the judgment on the award was void.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by L. Kreiss against A. P. Hotaling. On submission to arbitration an award was rendered, on which judgment was entered and perpetually stayed. Defendant appeals. Affirmed.

A. N. Drown for appellant; Henry E. Highton for respondent.

TEMPLE, C.—This appeal is from an order perpetually staying a judgment of award and all proceedings under it. It appears that a motion was made by the respondent to vacate the award. The learned judge of the court concluded that the submission to arbitration was not a statutory sub-

*For subsequent opinion in bank, see In re Kreiss, 96 Cal. 617, 31 Pac. 740.

mission, and therefore refused to entertain the motion, but ordered the judgment entered in form, and all proceedings under it to be perpetually stayed. This appeal is from that order, and there is no bill of exceptions, nor are the papers used on the hearing identified. It is claimed that the order is erroneous on various grounds, and among them, that there was no notice or showing, or even motion, before the court at the time. But, in the absence of a bill of exceptions, how do we know that? The order does not show this. On the contrary, it seems to imply that some showing was made. It is as follows: "In this cause, the motion of L. Kreiss, one of the parties above named, made June 11, A. D. 1888, for the purpose of vacating and setting aside the award in this proceeding, coming on regularly this day for hearing, the said L. Kreiss being represented by Henry E. Highton, Esq., his attorney and A. P. Hotaling, the remaining party to said alleged arbitration, being represented by A. N. Drown, Esq., his attorney, it appearing to the court that the submission to arbitration filed herein on April 17, A. D. 1888, is not a statutory submission under title 10, sections 1281 to 1290, inclusive, of the Code of Civil Procedure of this state, it is hereby ordered that upon this ground, and for this cause, and for want of jurisdiction thereof, the said motion is now dismissed; and it is further ordered that the judgment entered in form in the said proceeding by the clerk of this court be, and all proceedings thereunder be, and the same hereby are, perpetually stayed. Affidavits of A. P. Hotaling, M. E. Knoph, Augustus Laver, and R. Blum read and filed in opposition to said motion." The appellant claims that this contains two orders. How do we know, then, that there was not a motion and showing, in pursuance of which the second order was made, from which he appeals? However, we think the proper construction of the whole order is that the court denied the specific relief asked for by the moving party, and, in lieu of it made the order of which appellant now complains. The statement that the motion is dismissed means no more, under the circumstances, than that the application is denied. The judge, therefore, had before him whatever showing was made on the motion and both parties were present in court. It may be conceded that the order of perpetual stay cannot be justified unless it appeared to the court that

the award was wholly void as a judgment. For instance, it may have been made to appear affirmatively that the affidavit and notice required by section 1286, Code of Civil Procedure, were not filed or given. The clerk is a mere ministerial officer, and could enter such a judgment only when the necessary showing was made, and presumptions, if they are to be indulged in favor of such a judgment, may have been overcome. As the respondent's only remedy was by motion made before the entry of the judgment, this notice was of vital importance. Unless given or waived, the judgment would not be valid. It was not waived in the submission—conceding that it could have been—but the importance of the notice was emphasized by the stipulation that, when entered upon the judgment-book, the parties would ask for no reduction, new trial, or appeal. In the transcript there is copied what purports to be a judgment-roll, and among the papers so designated is an affidavit of respondent which seems to show that he had some kind of notice. If there be any such thing as a judgment-roll in cases of arbitration—which is not conceded—we still know of no rule which would make this affidavit, made to obtain a stay of proceedings, a part of it. And the same is true of respondent's exceptions, which purport to be a part of his affidavit. We think there can be no doubt of the propriety of an order directing the clerk not to issue execution upon what in form may appear to be a judgment, but which in fact is void. We think the order should be affirmed.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

HINCKLEY v. STEBBINS et al.

No. 13,746; February 2, 1892.

29 Pac. 52.

Decree of Distribution—Value of Items.—Where a decree of the probate court distributed to certain trustees the legal title to an undivided one-third of certain property, "that is to say, ... one-third of the aggregated value of all the six items hereinafter specified," and contained a statement of such items, together with the amounts thereof, the values of the various items were thereby fixed.

Probate of Will—Litigation Over Charity—Attorney Fees.—Where a testator leaves a portion of his estate to a charity, and the charity engages in litigation involving the construction of the will, its attorneys' fees will not be chargeable against the whole estate, but only against the portion devised to it.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by Mary C. Hinckley against Horatio Stebbins and others, trustees. From the final decree of the court, dividing certain trust funds, plaintiff appeals. Reversed.

William Barber for appellant; C. K. Bonestell for respondents.

FOOTE, C.—This suit was brought by the plaintiff, as residuary legatee under the will of William C. Hinckley, deceased, against the defendants, for the purpose of securing an accounting, procuring the sale of certain property, the payment of certain unpaid legacies out of the proceeds of that sale, and to obtain a division of the balance left in their hands between the residuary legatee and some of these defendants, as trustees of a certain charity. There had been a contest as to the construction of this will, and what proportion of the estate was to be distributed to the parties here, and this court, in 58 Cal. 517, adjudicated the matters there involved, and ordered a probate court decree of distribution to be made, modifying a previous one made on the 10th of March, 1879, which decree, modified as directed by the appellate court, was

made and entered on the 22d of May, 1882. This last decree has never been appealed from, and is in full force and effect. It is prayed in the complaint that the California Theater property, which had been by that decree distributed to certain of the defendants here, in trust for certain purposes, should be sold, and that from the proceeds of that sale, and any money remaining in the hands of these trustees derived from rents and profits of the theater property, should be paid certain twelve specific legacies, of $3,000 each. The answer of the legatees agrees to this prayer, and so does the answer of the trustees. Upon this state of affairs an interlocutory decree was entered, following this agreement. After that, upon findings of fact and conclusions of law filed by the trial court, a final decree was made and entered, dividing the remaining trust funds between the trustees for the charity and the residuary legatee, plaintiff and appellant here. It is claimed in her behalf that certain findings of fact made by the trial judge are not supported by the evidence, and that the conclusions of law attached do not follow the findings.

The most important matter, therefore, which is first to be considered and determined, is what the amended probate court decree does declare as to certain matters. The appellant contends that the third finding of fact, made by the trial court, is not sustained by the language of the amended probate court decree of distribution. It is said that the decree does not affix any value to the distributable assets at the date of its entry, and that the finding assumes that it does fix such value, and therefore that such finding is erroneous. The finding is as follows: "The value of the distributable assets of the estate at the date of the amended decree, May 22, 1882, estimating the value of the theater property at $120,000, at which sum it had been appraised in the probate court on the fifth day of June, 1876, was $150,492, less the amount of the unpaid mortgage of $37,500, referred to in the decree,—the remainder being $112,992, of which one-third is $37,664." The decree referred to reads thus: "To the trustees and their successors hereinabove named is hereby distributed the legal title to an undivided interest in the California Theater property, equal to one-third (⅓) of the distributable estate of said testator, that is to say, equal to one-third of the aggregated value of all the six items hereinafter specified as the distributable

assets of said estate. . . . . The distributable assets of the estate of said testator, one-third of which is subject to the charitable uses, are as follows, viz.: (1) Cash heretofore paid to legatees amounting to $8,912.02. (2) Cash distributed to trustees, $6,420.90. (3) The house and lot on Bush street, appraised, $11,500. (4) The personal property in said house, appraised at $3,659.50, being all the personal property mentioned in the inventory, excepting mining stock and the $60 in money. (5) One hundred and fifty shares of stock in the Scorpion Silver Mining Company. (6) The California Theater property, inventoried and appraised on the fifth day of June, 1876, as of the value of $120,000, and which said theater property is subject to the said mortgage held by said Frank H. Woods." This mortgage was in the sum of $37,500. From the original probate court decree and the amended decree, from which the quotation is taken, it is easily perceived that, by direction of the supreme court in the case heretofore alluded to, the probate court was proceeding to carry out the views of the appellate tribunal in fixing the share or proportion of the California Theater property which would go to the trustees for the charity; and, inasmuch as the theater property was all that was left of the estate in their hands, in order to determine what that proportion was, it was deemed necessary to enumerate certain distributable assets that had passed from the hands of the trustees to those entitled thereto, and of which the charity had no benefit, and the theater property. In this enumeration the theater property was stated to have been appraised at $120,000, and it was also stated that it was subject to a mortgage of $37,500. The decree does fix the values of various items of distributable property, and whether the values so fixed are upon a right basis or not, as the probate court fixed the value of that property at its appraised value, which is contrary to both the statute and the decision of the supreme court, which the lower tribunal was then carrying out (Code Civ. Proc., secs. 1445, 1451; Estate of Hinckley, 58 Cal. 517), it must stand if it is a decree of distribution at all, as it is not appealed from, and is in full force and effect. This part of the decree was for the purpose of determining what the distributable assets then were out of which the trust was to be awarded an interest in the theater property, equal to one-third of the distributable assets,

whatever they might be. This amended decree did undertake to vest in the trustees for the charity a definite fractional interest that was fixed as to value in the theater property. It did nothing more than to follow the supreme court in its directions, and distributed to the charity an interest in the theater property which was all that then remained in the hands of the trustees, under the will of Hinckley, of the estate, equivalent to one-third of the whole of the then known items of the distributable assets of the estate as of that date, which was then positively known or declared in the decree. And a specific value was given of that share of the whole distributable assets. By making an arithmetical calculation, based on the language of the decree, it appears that the whole value placed on the distributable assets was $150,492, less the mortgage of $37,500, all debts and liabilities and costs of administration having then been paid, and the net result is that the distributable assets was then the amount of $112,992. Of that, according to the decree, which seems to have followed the decision of the appellate court (58 Cal. 516), the trust was entitled to $37,664; and since there was no distributable assets to pay it out of except the theater property, there was given to the charity a legal interest in the theater property equal to one-third of the whole of the distributable assets ascertained by the decree. The charity from thenceforth owned 37,664/120,000 of the theater property, subject to the payment of its share of the mortgage; for, after distribution, the interest of the charity was not subject to any future costs or liabilities which might be incurred by the trustees, not growing out of the encumbrance or mortgage.

The income of the theater property was charged by the final decree with the payment of the twelve $3,000 legacies, and what was left of that charity was entitled to 37,664/120,000 thereof. How, then, is the present accounting to be stated between the parties thereto? It appears that the theater property afterward, by consent of all parties, was sold for $126,000. 37,664/120,000 of this sum, less the amount paid out for the mortgage debt and interest, belonged to the charity, Amount received from increase of the property was $115,416.67. From this sum the legacies were to be paid before any division between the parties hereto. That sum is $36,921.85, according to finding 6. The item of taxes on mortgage, if

payable by the estate at all, was payable out of the interest of each party, on the basis of his proportional interest; and it does not seem to be questioned that it was payable out of the interest of some one, a party here, and not the mortgagee. The Scorpion stock assessment paid was, of course, chargeable against the share of the residuary legatee. From the finding we should judge that the $500 fee paid Mr. Baldwin for litigation about the mortgage was payable out of the interest of both parties, in proportion to their share in the theater property. The balance expended by the trustees seems to have been, according to the record, $60,628.50, which the trial court charged wholly against the gross income, $115,416.67. It does not appear what this sum of $60,628.50 was paid out for, except $100 mentioned in findings 6 and 7, and $5,850 (erroneously added up as $5,000), mentioned in finding 7; so it will be presumed that all of that sum, except $5,950, is chargeable, as allowed, to the entire gross receipts. But we cannot perceive how any party to this proceeding except the charity is chargeable with this last sum. The money was not for the costs of administration or debts, but for counsel fees to those employed by the trustees of the charity to litigate their side of the controversy, and to get all that was possible from the residuary legatee for the benefit of the charity. The charity was the real party in interest, and should pay its own attorney's fees. It will thus be seen that finding 5, where it assumes the balance on hand for division to be $95,157.10, and the second, third, fourth and fifth conclusions of law are erroneous. The judgment should therefore be reversed, and we so advise.

I concur: Fitzgerald, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed.

SNEATH v. WATERMAN et al.

No. 14,860; February 12, 1892.

28 Pac. 1061.

Appeal—Dismissal—Service of Notice.—Where the affidavit of service on the adverse attorney of a notice of motion to dismiss an appeal does not show that any attempt was made to serve him at his office between the hours of 8 o'clock A. M. and 6 o'clock P. M. of the day when the notice was left at his residence, the motion to dismiss will be denied.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Sneath against Waterman and others. Judgment for defendants. Plaintiff appeals. On motion to dismiss the appeal. Motion denied.

John R. Jarboe and James L. Crittenden for respondents.

PER CURIAM.—The affidavit of service upon the adverse attorney of the notice of motion to dismiss the appeal herein does not show that any attempt was made to serve him at his office between the hours of 8 o'clock A. M. and 6 o'clock P. M. of the day when the notice was left at his residence. The motion to dismiss is denied, without prejudice.

Harrison, J., being disqualified, took no part in the decision of the above motion.

CROSS v. REED.

No. 14,522; March 12, 1892.

29 Pac. 244.

Appeal—Conflicting Evidence.—An Appellate Court will not disturb the judgment of a trial court, where the plaintiff and defendant were the principal witnesses at the trial, and their testimony was conflicting.

APPEAL from Superior Court, San Luis Obispo County; V. A. Gregg, Judge.

Action by John Cross against F. C. Reed. From a judgment for defendant, and from an order refusing a new trial, plaintiff appeals. Affirmed.

Gibbon & Creighton and Wilcoxon & Bouldin for appellant; W. H. Spencer for respondent.

BELCHER, C.—This is an appeal from a judgment and order refusing a new trial, and the only ground urged for a reversal is that some of the material findings were not justified by the evidence. The action was brought to recover the sum of $8,000, with interest, and it was alleged that the money was furnished by plaintiff to defendant for investment on plaintiff's account in real property, and invested by defendant in a manner which was unauthorized and fraudulent. The plaintiff and defendant were the principal witnesses at the trial, and their testimony upon the material issues was substantially conflicting. No brief has been filed on behalf of respondent, but, after carefully reading all the evidence brought up in the record, we think it must be held, under the well-settled rule of this court, that the action of the trial court cannot be disturbed for the reason urged. We therefore advise that the judgment and order be affirmed.

We concur: Temple, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

In re SWEET'S ESTATE.

No. 15,000; March 17, 1892.

29 Pac. 249.

Appeal.—A Motion to Dismiss an Appeal on the Ground that the transcript has not been filed within the time prescribed by the supreme court rules will be denied, where the certificate of the clerk of the trial court on which such motion is based does not conform to supreme court rule 4.[1]

APPEAL from Superior Court, City and County of San Francisco.

In the matter of the estate of Taatemi Sweet, deceased. On motion to dismiss an appeal from a decree of distribution. Motion denied.

Dunne & McPike for appellant; Timothy J. Lyons and W. A. Stuart for respondent.

PER CURIAM.—This is a motion to dismiss an appeal from a decree of distribution, upon the ground that the transcript has not been filed within the time prescribed by the rules of this court. A motion to dismiss an appeal upon this ground must be based upon a certificate of the clerk of the trial court, certifying the facts required by rule 4 of this court.[1] The certificate relied upon in this case does not meet the requirements of the rule. Let the motion to dismiss the appeal be denied without prejudice.

[1] Rule 4 requires the certificate to show the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the date of service thereof on the adverse party, and the character of the evidence by which such service appears; the fact and date of filing and undertaking on appeal, and that the same is in due form; the fact and the time of the settlement of the bill of exceptions and the statement on appeal, if there be any; and also that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

YOUNG v. DONEGAN.

No. 13,900; March 26, 1892.

29 Pac. 412.

Appeal—Matters not Apparent of Record.—A contention on appeal that the court erred in matter of law in rejecting a part of appellant's counterclaim cannot be considered where there is no foundation for the point in the record, either by exception or specification.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by Frank C. Young against D. F. Donegan. Judgment for plaintiff. Defendant appeals. Affirmed.

Richard Dunnigan for appellant; J. M. Damron for respondent.

VANCLIEF, C.—Action to recover $1,769, as the value of labor done and materials furnished by plaintiff in building a house for defendant. The answer of defendant denies that the plaintiff did the amount of labor or furnished the amount of materials alleged in the complaint; and also denies the alleged value of the labor and materials admitted to have been done and furnished, but admits them to have been of the value of $841.70. Defendant also pleads a counterclaim against plaintiff for labor and materials, amounting to $139.75. The cause was tried by the court, and judgment given for the plaintiff in the sum of $1,177,15. From this judgment, and from an order denying his motion for a new trial, the defendant appeals.

1. It is contended for appellant that the evidence is insufficient to justify certain findings of fact as to which his counsel admits that there is a slight conflict of evidence. It seems to me, however, after a careful examination of the evidence, that the conflict is substantial to a degree which precludes consideration of the question here.

2. Appellant's counsel in his brief makes the point that the court erred in matter of law in rejecting a part of defendant's counterclaim; but there is no foundation for this

point in the record, either by exception or specification. I think the judgment and order should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

MONAHAN v. SAN DIEGO COUNTY.

No. 14,703; March 28, 1892.

29 Pac. 417.

Constables—Mileage Fees.—Under Act of March 5, 1870, providing that constables shall receive mileage for "every mile necessarily traveled, in going only, in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on habeas corpus, taking prisoners before a magistrate or to prison," a constable is entitled to mileage both for the distance traveled in going to make an arrest, and for that traveled in bringing his prisoner from the place of arrest to the magistrate or to prison. Allen v. Napa County, 82 Cal. 187, 23 Pac. 43, followed.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

Action by T. J. Monahan against the county of San Diego for fees as constable in criminal cases. Judgment for plaintiff. Defendant appeals. Affirmed.

Hunsaker, Britt & Goodrich for appellant; Leonard Goodwin and Works, Gibson & Titus for respondent.

VANCLIEF, C.—The plaintiff, as a constable, charged the defendant fees for services in criminal cases, amounting to $578.75, and presented to the board of supervisors his verified, itemized bill for this amount. The board allowed his claim to the extent of $384, but rejected it for the balance of $194.95, on the ground that the charge for the sum rejected was for "mileage in bringing various persons arrested by him from

the place of arrest to the court from which the warrant of arrest was issued, or from the place of arrest to the county jail, in addition to mileage for going from the place where said process was issued to the place where the arrest was made; that is to say, ... claimed mileage for both going to arrest such persons, and for bringing such persons before the magistrate or to prison from the place of arrest." Plaintiff sued and recovered judgment for his entire demand. The defendant brings this appeal from the judgment on the judgment-roll.

The questions presented were decided adversely to appellant's contention in Allen v. Napa County, 82 Cal. 187, 23 Pac. 43, following Cunningham v. San Joaquin County, 49 Cal. 323. I think the judgment should be affirmed.

We concur: Fitzgerald, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

PEOPLE v. NAGLE.

No. 20,892; April 1, 1892.

29 Pac. 640.

Larceny—Appeal.—On Trial for Larceny, where there was some evidence tending to show defendant's guilt, a verdict of guilty will not be disturbed on the ground of the insufficiency thereof.

APPEAL from Superior Court, City and County of San Francisco; J. C. Hebbard, Judge.

Maggie Nagle was convicted of petit larceny, and appeals. Affirmed.

Alex. Campbell, Jr., for appellant; Attorney General Hart for the People.

PER CURIAM.—Appellant was convicted of petit larceny under an information charging grand larceny, and now insists

the evidence is insufficient to justify the verdict. There was some evidence before the jury tending to show the guilt of the defendant, and, under those circumstances, we will not disturb the verdict.

Let the judgment and order be affirmed.

CAIN v. CODY.*

No. 14,412; April 29, 1892.

29 Pac. 778.

Replevin—Damages.—In an Action to Recover Possession of certain charcoal, and damages for its detention, the verdict was as follows: "We, the jury, ... find judgment for plaintiff in the following amount, to wit: Value of coal, $546; damages in pursuit of recovery of property, $384; total, $930." Held, that the verdict was a general finding that plaintiff was entitled to a return of the property, and a special finding as to value and damages.

Replevin—Damages.—It was Proper to Allow Damages as compensation for the time and money expended in pursuit of the property.

Replevin—Amendment of Complaint.—In Replevin, upon the Introduction of plaintiff's evidence as to the quantity and value of the coal alleged to be withheld, there was no abuse of discretion in permitting an amendment of the complaint so as to allege the detention of a larger quantity of coal, of greater value, and correspondingly increased damages.[1]

APPEAL from Superior Court, Mono County; O. F. Hakes, Judge.

Action by James S. Cain against M. J. Cody to recover possession of certain personal property and damages for its detention. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

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*Rehearing granted.

[1] **Cited** and disapproved in Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 986, where, on a matter of amending a pleading, it is held a federal court is not bound to follow state courts in their construction of local statutes.

W. H. Virden (Reddy, Campbell & Metson of counsel) for appellant; W. O. Parker for respondent.

VANCLIEF, C.—Action to recover possession of personal property (two thousand eight hundred and fifty bushels of charcoal) or the value thereof, in case a delivery cannot be had, and $384 damages for the wrongful detention thereof. The defendant denied that plaintiff was owner or entitled to possession of the property, denied that the value thereof exceeded $100, and denied all damages. But he avowed the taking and detention, and justified the same as sheriff, under a writ of attachment at suit of W. T. Elliot against one Hock Chung, alleging that the charcoal was the property of Hock Chung, and subject to the attachment. The cause was tried by a jury, whose verdict was as follows: "We, the jury impaneled to try the case in which J. S. Cain is plaintiff and M. J. Cody is defendant, find judgment for plaintiff in the following amount, to wit: Value of coal, $546; damages in pursuit of recovery of property, $384; total, $930." Upon this verdict the court rendered judgment that plaintiff recover possession of the charcoal described in the complaint, "to wit, 2,850 bushels, more or less," or the sum of $546, the value thereof, in case delivery cannot be had, and the sum of $384 damages for the detention of said personal property, together with plaintiff's costs. No objection to the form or substance of the verdict appears to have been made in the court below until twenty-two days after the verdict was recorded and the jury discharged.

1. It is urged by counsel for appellant that the verdict is insufficient, because it fails to find "the right of the plaintiff to the possession of the property," and therefore furnishes no basis upon which the judgment for a return of the property, or for the value thereof in case a return could not be had, can stand. Though informal, I think the verdict may be fairly construed to be a general verdict for the plaintiff, besides separately and specially finding the value of the property and assessing the damages. This general verdict for plaintiff responds to all issues as to which the law does not require a special verdict, and implies a finding that plaintiff was owner and entitled to the possession of the property, since no special verdict to this effect is required in an action of this kind:

Etchepare v. Aguirre, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657. The word "judgment" was evidently used by the jury in the sense of the word "verdict."

2. It is contended that the verdict is erroneous, for the reason that the jury allowed as damages compensation for the time and money expended in pursuit of the property. This question was well considered, and decided adversely to the views of appellant in the late case of Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656. Whether or not these damages should have been specially pleaded is not involved in this case, since no objection to the evidence thereof was made on this ground in the court below, and no point upon this question is made by counsel here.

3. During the trial, while the evidence for plaintiff as to the quantity and value of the coal was being given, plaintiff moved the court for leave to amend his complaint by inserting two thousand eight hundred and fifty bushels of charcoal, instead of about fifteen hundred bushels, and by inserting the sum of $712.50 as the value thereof, instead of $400, and by striking out the sum of $200 damages, and in lieu thereof inserting $384. The court took the motion under advisement until the evidence was closed, but before the case was submitted to the jury the court granted the motion. Before retiring, a juror, from his place in the box, asked the court if plaintiff's motion to amend his complaint was granted, and the court answered that it was. These amendments were not actually engrossed in the complaint until after the verdict of the jury had been rendered and recorded, when plaintiff's counsel asked the court to instruct the clerk to insert them in the complaint. The court so instructed, and the clerk then inserted them according to the order of the court; but the amendment as to the number of bushels of coal does not appear in the copy of the complaint in the transcript. It is insisted that the court erred in allowing these amendments. That it was within the discretionary power of the court to allow these amendments for the purpose of conforming the complaint to the evidence on the part of plaintiff, and that the action of the court in this respect will not be regarded as reversible error unless it appears that the defendant may have been injured thereby, seems to be well settled: Hooper v. Wells,

27 Cal. 35, 85 Am. Dec. 211; Farmers' etc. Bank v. Stover, 60 Cal. 387; Cheney v. O'Brien, 69 Cal. 200, 10 Pac. 479; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673. As to the number of bushels of coal, I think the amendment was unnecessary. The coal sued for was described in the complaint as being all the coal then in two certain buildings, and as being "about 1,500 bushels." The first part of the description, viz., "all the coal then in the two buildings," was sufficient to enable the officer or any person to find and identify the property sued for; and was limited by the last part of the description, "about 1,500 bushels," as it might have been had it been necessary to segregate or distinguish the coal sued for from other coal in the same buildings. Besides, there was no issue as to the quantity or identity of the coal sued for. The pleadings show that each party claims the same coal by the same description, to wit, all the coal in the two buildings. The defendant claims to have rightfully taken possession of it by virtue of writs of attachment and execution. Had the defendant prevailed in the action, he, as against the plaintiff, would have been entitled to the possession of all the coal in the two buildings at the time the action was commenced, even though the complaint had not been amended, and though the quantity had been proved to be two thousand eight hundred bushels, "more or less." As to the value of the coal, and as to the amount of damages, the pleadings were at issue before the complaint was amended; and it must be presumed, in the absence of a showing to the contrary, that the defendant was as well prepared as he could have been, with evidence, to reduce both the value and the damages to the lowest possible figure; and consequently that no additional preparation was necessary to meet or disprove the amendments of the complaint as to such value and damages; and as it does not appear that defendant stated to the court any ground or reason for his objection to the proposed amendments, or asked for any postponement of the trial to enable him to procure additional evidence, it is difficult to conceive how those amendments could have been unjustly prejudicial to his defense. On the contrary, so far as material, they appear to have been in furtherance of justice. Surely no abuse of the discretionary power of the court is made to appear.

4. For reasons above stated, the description of the property in the judgment, being the same as that contained in the complaint, is sufficiently definite.

5. Appellant's points on the admission of evidence on the part of plaintiff are not sufficiently plausible to require special consideration.

6. The instructions given to the jury were quite as favorable to the defendant as he was entitled to ask. The instruction asked by defendant, numbered 4, so far as correct, was embodied in the instruction given numbered 1. If there had been no evidence of a sale from McBride to plaintiff of a part of the coal sued for, the court might have so instructed the jury, as that was a question of law; but if, in the opinion of the court, there was evidence tending to prove such sale, the question as to whether such evidence was sufficient to prove a sale of all the coal, or only a part of it, was the only question that could have been properly submitted to the jury; and since it clearly appears that the evidence tended to prove a sale of all the coal sued for, it follows that, so far as the requested instruction submitted to the jury the question as to whether or not there was any evidence of such sale, it was erroneous, and was properly refused. The requested instruction numbered 6 was properly refused, for the reason (if for no other) that it excluded damages as compensation for time and money expended in pursuit of the property. So far as the requested instruction numbered 8 is correct, it is substantially embraced in the instructions given numbered 3, 6, and 7. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

LILLIS et al. v. PEOPLE'S DITCH CO.*

No. 13,807; April 30, 1892.

29 Pac. 780.

Res Adjudicata.—In an Action to Enjoin the Diversion of "Any Water" from a river, and the obstruction thereof by "any" dam, defendant claimed a right, by adverse user, to divert "14,400 inches per second, under a four-inch pressure." It was adjudged that plaintiff's cause of action was barred, the court finding specially that defendant had adversely diverted "one hundred cubic feet per second, under a four-inch pressure." Held, in a subsequent action by plaintiff to enjoin the diversion of a greater quantity of water than "14,400 cubic inches per second," that defendant was not estopped by the first judgment to claim that it had acquired the right to divert more than that quantity, since the special finding in the first action should be construed to mean that it had a right to one hundred miner's feet, equal to fourteen thousand four hundred miner's inches, per second, under a four-inch pressure, the amount intended to be claimed in the answer; and judgment was properly rendered that defendant was entitled to an equivalent quantity, "450 cubic feet of water per second," under the evidence, which showed, in addition to the rate at which the water would flow under such pressure through an aperture of one hundred square feet, that defendant, when taking steps to appropriate the water under Civil Code, section 1415, after posting notices claiming fourteen thousand four hundred cubic inches per second under a four-inch pressure, constructed a ditch of sufficient capacity to carry off seven hundred and seventy-seven thousand six hundred cubic inches, equal to four hundred and fifty cubic feet, per second, rather than fourteen thousand four hundred cubic inches only.

Judgment—Parol to Explain.—The Judgment in the First Action being ambiguous, parol evidence as to the capacity of the ditch was admissible to aid in construing it.

APPEAL from Superior Court, Fresno County; J. B. Campbell, Judge.

Action by S. C. Lillis and others against the People's Ditch Company for an injunction. From a judgment for defendant, plaintiffs appeal. Affirmed.

Brown & Daggett (Daggett & Adams of counsel) for appellants; N. O. Bradley, G. E. Lawrence and W. D. Tupper (Bradley & Farnsworth of counsel) for respondent.

*Rehearing granted.

VANCLIEF, C.—The object of this action is simply to enjoin the defendant (a corporation) from diverting from the channel of Kings river, into its ditch in Tulare county, a greater quantity of water than fourteen thousand four hundred cubic inches per second, on the ground that it had been adjudged by the superior court of that county, in a former action between the same parties, that this defendant, as against the plaintiffs, was entitled to divert only that quantity of water. In their complaint in this action the plaintiffs pleaded the former judgment as an estoppel. Judgment herein was in favor of the defendant, and plaintiffs appeal from the judgment, and from an order denying their motion for a new trial, made on a bill of exceptions, which, among other things, contains a copy of the judgment-roll in the former action.

The principal question presented for decision is, what was adjudged in the former action as to the quantity of water to which defendant was entitled? The former action was of the nature of a common-law action on the case, brought by the plaintiffs herein on September 11, 1883, to recover from this defendant damages for the diversion of water from Kings river, to the injury of plaintiffs' riparian rights upon that stream; and, in addition to this, sought equitable relief by injunction against a continuance of the diversion complained of. The plaintiffs' prayer in that action was that plaintiffs recover damages in the sum of $60,000, and that defendant be perpetually enjoined "from diverting any water from the channel of Kings river by means of said ditch or dam, or either of them; and from placing or maintaining in the bed or channel of said Kings river any dam or obstruction; and from interfering in any manner with the free and natural flow of the waters of said stream in their natural channel." The allegations of the complaint in that action, if true, were sufficient to entitle the plaintiffs to all the relief they prayed for. As to the quantity of water diverted, it was alleged that defendant had diverted a large quantity—all the water—so that there was none left flowing in the river below the head of defendant's ditch.

The answer in the former action denied the alleged riparian rights of the plaintiffs; denied that it had diverted any more water from the river than it was entitled to divert; alleged that in 1874 it "acquired the right, and has ever since had,

and still has, the right to divert from said river, and to use for the purposes aforesaid, 14,400 inches per second, under a four-inch pressure, of the waters thereof"; and that in 1875 it constructed across the river "a dam of sufficient height and strength only to turn into its ditch the quantity of water to which it was and is entitled"; and further alleged a continuous adverse user of its right so acquired during a period of more than five years before the commencement of that action; and further alleged "that the cause of action set forth in plaintiffs' complaint is barred by the provisions of sections 318, 319, Code of Civil Procedure." Upon the issues as to plaintiffs' alleged riparian ownership of lands on the stream below the point of defendant's diversion, the court found for the plaintiffs. But, upon the issues as to the alleged adverse appropriation and user by defendant, the court found that in January, 1874, "defendant, under the laws of this state, and in conformity therewith, publicly, openly, peaceably, notoriously, and adversely to the plaintiffs and to the whole world, constructed its ditch and dam, as hereinbefore found, and took from the waters of Kings river one hundred cubic feet per second under a four-inch pressure, ... and diverted the same into its said ditch, ... and has continued so to divert such water from about the 1st day of January, 1874, down to the time of the commencement of this [former] action." The finding further proceeds to state all the requisite acts and facts to constitute an adverse user from January, 1874, until September, 1883, and concludes as follows: "Wherefore, as conclusions of law, the court finds that plaintiffs' cause of action is barred by the statute of limitations, and that they are not entitled to recover anything, but that defendant is entitled to recover its costs herein, taxed at $382.89. Let judgment be so entered." Accordingly, the judgment in the former action was simply "that plaintiffs take nothing by this action," and that defendant recover its proper costs. In the present action the court found as facts that, continuously from 1874 until the commencement of the former action, the defendant diverted from the river, and conducted through its ditch, adversely to the plaintiffs, four hundred and fifty cubic feet of water per second, and that it never had diverted more than that quantity at any time before the commencement of this action (June 9, 1888), "or any

greater quantity of water than that which it had always claimed that it appropriated and had acquired the right to divert prior to said year 1884"; and as conclusions of law found "that it is entitled to take and divert from said Kings river, as against plaintiffs, four hundred and fifty cubic feet of water per second; that plaintiffs' cause of action is barred by the statute of limitation; and plaintiffs are not entitled to recover anything, but the defendant is entitled to recover its costs herein incurred. Let judgment be entered accordingly"; and judgment was so entered. The evidence was abundantly sufficient to justify the finding of these facts, and these facts justified the conclusions of law. But appellants claim that the former judgment estopped the defendant from claiming or proving a right to more than one hundred cubic feet of water per second, because, they say, the findings of fact in the former action limited defendant's right to one hundred cubic feet per second.

Whether or not the former judgment was merely erroneous is not in question here, although, if uncertain, it may be construed for the purpose of ascertaining what was expressly, or by necessary implication, adjudged. Code of Civil Procedure, section 1908, subdivision 2, provides that, in cases of this kind, "the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest." And section 1911 declares, "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily, included therein or necessary thereto." These sections of the code are in harmony with the weight of authority in other states: Freeman on Judgments, sec. 256. The former judgment was expressly based solely upon the defense that plaintiffs' cause of action was barred by the statute of limitations; and necessarily so, because all other issues were expressly decided in favor of plaintiffs. Besides, this defense is a confession and avoidance of plaintiffs' cause of action.

Section 458 of the Code of Civil Procedure permits this defense to be pleaded by mere reference to the sections pleaded, without stating the facts constituting the defense; which facts, however, are implied in that form of the plea, and, if controverted, must be proved by defendant; and, being new matter

constituting a defense, they are deemed controverted: Code Civ. Proc., sec. 462. The principal fact constituting this defense, thus implied in the plea, and controverted by the implied replication, is the uniform and continuous adverse user by defendant during a period of five years, coextensive with the greatest quantity of water diverted at any time during that period. In other words, the issue raised by the implied replication to the plea extends over and covers all diversions of water by defendant during that period, and a general finding by the court "that plaintiffs' cause of action is barred by the statute of limitations" is sufficient (Oakland Gaslight Co. v. Dameron, 67 Cal. 663, 8 Pac. 595), and necessarily implies all that is implied in the plea, viz., all the facts required to constitute a complete defense, including the requisite adverse user to give title to defendant; since a plea of the statute of limitations by mere reference to the section pleaded, according to section 458, Code of Civil Procedure, is a good plea of a prescriptive right to the use of water in cases of this kind: Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379. That the court denominated this finding a "conclusion of law" is of no consequence; for, conceding that it is a conclusion of law, the code authorizes it to be pleaded and found as the representative and equivalent of the facts from which it is drawn. The code makes this an exception to the general rule requiring facts only to be pleaded, for which, perhaps, no sufficient reason is perceptible; yet without doubt the legislature had power to make the exception.

From the foregoing considerations it would seem to follow that it was necessary to the former judgment sustaining the plea of the statute of limitations that the court should have found that the adverse user was commensurate with all diversions of water by defendant during the period necessary to give defendant a prescriptive right, and thereby to complete the defense that plaintiff's cause of action was wholly barred; otherwise the defense was incomplete, and could not have been sustained as to the whole cause of action, but only as to a part of it; in which case the plaintiffs must have recovered, at least, nominal damages. Had the defendant diverted only one hundred feet during the whole period of five years' adverse user, but had diverted two hundred feet during only the last two years of that period, the plea of the statute could not have

been sustained as a defense to the diversion of the additional one hundred feet during the last two years.

But for the merely affirmative finding in the former action, that the defendant adversely diverted and used "one hundred cubic feet per second, under a four-inch pressure," it would be clear that the finding "that plaintiffs' cause of action was barred by the statute of limitations" necessarily implies that defendant's adverse user during said period of five years comprehended all diversions by defendant for which it otherwise would have been liable, whether such diversions were at the rate of one hundred cubic feet of water per second, as found by the court in the former action, or at the rate of four hundred and fifty cubic feet per second, as found by the court in this action. But it is contended for appellants that the finding in the former action specially limits the adverse user, and consequently the prescriptive right of the defendant, to one hundred cubic feet of water per second, and that this special limitation must prevail over anything inconsistent with it in the more general findings in the same action. Conceding that, as a general rule, specific findings prevail over general findings which are inconsistent with them, I think this case furnishes no occasion for the application of the rule, for the reason, if for no other, that the special finding in the former action, properly construed, is not inconsistent with the general finding that plaintiffs' cause of action was barred by the statute of limitations, or with anything implied in this general finding. That the so-called "special finding" is ambiguous, uncertain, and therefore a proper subject of construction, appears upon its face. It cannot be so construed as to give effect to all its words and phrases of well-defined meaning. Either the phrase "under a four-inch pressure," or the words "cubic feet per second," must be denied any effect; and the question is, which of these shall be rejected?

The answer of the defendant in the former action alleged that in 1874 it acquired the right to divert and use fourteen thousand four hundred "cubic inches" of water per second, "under a four-inch pressure"; and the special finding is that in 1874 "defendant, under the laws of this state and in conformity therewith, ... took from the waters of Kings river one hundred cubic feet per second, under a four-inch pressure," etc., which is equal to one hundred and seventy-two

thousand eight hundred cubic inches, and nearly twelve times fourteen thousand four hundred cubic inches, to which defendant alleged it had acquired the right. "The laws of this state," under and in conformity with which the court found that the defendant had acquired the right to one hundred cubic feet per second, must have been those contained in the Civil Code, section 1415, which is as follows: "A person desiring to appropriate water must post a notice in writing, in a conspicuous place, at the point of intended diversion, stating therein: (1) that he claims the water there flowing to the extent of [giving the number] inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted."

The rule of measurement prescribed by this section is not by cubic inches, but by square inches, according to the well-known rule of miner's measurement, by which the "four-inch pressure" is made an effective factor, which cannot be disregarded. An inch of water, by this rule of measurement, is the quantity that will be forced through an aperture of one inch square by a pressure of water four inches in depth above the aperture. Consequently one foot of water, by this measurement, would be equal to one hundred and forty-four square inches upon a cross-section of the stream, and one hundred feet would equal fourteen thousand four hundred square inches. Assuming that the headgate, through which the water is to be measured and admitted into the ditch, is forty feet wide (which accords with the evidence in this case), the gate would have to be raised two and one-half feet to admit the passage of one hundred feet, or fourteen thousand four hundred inches, by the miner's or Civil Code rule of measurement. Then, in order to pass four hundred and fifty cubic feet of water per second—the quantity awarded to defendant in this action—the water would have to flow through the gateway at the rate of four and one-half feet per second, which would be equal to a rate of two hundred and seventy feet per minute, or about three miles per hour. Assuming that, under a pressure of

four inches, the water would flow at this rate, the quantity passing the gate per second would be precisely equal to fourteen thousand four hundred miner's inches, and also to one hundred miner's feet. Therefore, if the special findings of the court on the former trial, as to the number of inches and feet of water, are construed to mean miner's inches and miner's feet, those findings will be perfectly consistent with each other and with defendant's answer in that action. Besides, they will not appear to be inconsistent with the findings in this action, since there is no evidence that one hundred feet, by miner's measurement, is not equal to the four hundred and fifty cubic feet per second, to which in this action the defendant was adjudged to be entitled. No attempt appears to have been made at the trial of this action to reduce the "450 cubic feet per second" to miner's feet, nor to reduce the one hundred miner's feet to cubic feet per second. The finding that defendant acquired its right to the water under and in conformity with the laws of this state (Civil Code), and that the water was to be measured by inches or feet under a four-inch pressure, plainly indicate that the miner's rule of measurement, adopted by the Civil Code, was intended. Yet these were disregarded as meaningless, because inconsistent with the words "cubic feet per second"; and thereby the findings of fact were made inconsistent with each other, and inconsistent with the judgments in both actions. Why not, rather, reject the words "cubic feet per second," and thereby make the findings of fact consistent with each other, and consistent with both judgments? These ends are sufficient of themselves to turn the scale in favor of rejecting the words "cubic feet per second." But there is another circumstance which may be considered favorable to this construction, and which consists of the acts of the defendant, by its agents, under and immediately after the posting of its notice in accordance with section 1415 of the Civil Code, claiming "14,400 cubic inches per second under a four-inch pressure." Instead of constructing a small ditch of a capacity to carry merely fourteen thousand four hundred cubic inches per second, equal to about eight and one-third cubic feet per second, the defendant proceeded to construct a ditch of about twenty miles in length, and of sufficient capacity to carry seven hundred and seventy-seven thousand six hundred cubic inches per

second, equal to four hundred and fifty cubic feet per second, being of about fifty times the capacity required to carry fourteen thousand four hundred cubic inches per second, yet, presumably, of no greater capacity than required to carry fourteen thousand four hundred miner's inches. Through this ditch defendant continued to divert water to its full capacity, without interruption, for more than five years before the commencement of the former action. These acts show that, by its notice under the code, the defendant intended miner's inches, and not cubic inches; and the findings of the court in the former action must have been so intended, and should be so construed. It cannot reasonably be presumed that in the former action the court intended to award to the defendant eleven times as much water as it claimed in its answer; yet, by the construction contended for, that court awarded one hundred cubic feet per second, which is more than eleven times fourteen thousand four hundred cubic inches per second—the quantity claimed by the answer. No doubt the intention of the court was to give defendant the equivalent of the number of inches claimed (fourteen thousand four hundred), reduced to feet (one hundred); and, construing them to mean miner's inches and miner's feet, the reduction was correct, but, if cubic inches and cubic feet were intended, it was wildly erroneous. The effect of the findings and judgment in the present action is to reject the words "cubic feet per second," in the former findings, and to give effect to the words "under a four-inch pressure"; which, under all the circumstances, I think to be a correct construction of those findings. The parol evidence tending to prove the capacity of the ditch, and the quantity of water actually diverted during the adverse user, prior to the former action, was properly admitted as an aid to the construction of the former judgment, which, upon its face, is ambiguous and uncertain as to the quantity of water awarded to defendant in that action, and it could have had no other effect prejudicial to the plaintiffs: Gray v. Dougherty, 25 Cal. 266; Garwood v. Garwood, 29 Cal. 521; Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379. The objection to this evidence improperly assumed that the former judgment was too plain to admit of construction.

and that the effect of this evidence was to contradict it. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Fitzgerald, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

DE HAVEN, J.—I concur in the judgment affirming the order appealed from.

CHILDS et al. v. KINCAID et al.

No. 14,714; July 11, 1892.

30 Pac. 525.

An Appeal not Taken Within the Time Prescribed by law will be dismissed.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by Childs and others against Kincaid and others. Judgment for plaintiffs, and defendants appeal. Dismissed.

Willis & Cole and E. E. Rowell for appellants; Bicknell & White and S. M. White for respondents.

PER CURIAM.—The judgment in this case was entered July 19, 1890, and the order denying a new trial was made and entered March 16, 1891. On the twenty-first day of July, 1891, the defendants filed and thereafter served a notice of appeal from said judgment and order. The respondents now move to dismiss the appeals upon the ground that neither of them was taken within the time prescribed by law. As the appeal from the judgment was not taken within a year after its entry, and the appeal from the order denying a new trial was not taken until more than sixty days after its entry, the motions must be granted; and it is so ordered.

DE PENA v. TRUJILLO.

No. 14,440; July 23, 1892.

30 Pac. 560.

Appeal Without Merit—Damages as Costs.—Defendant in ejectment, after pleading the general issue and possession for the statutory period, filed a disclaimer of any interest, but from a judgment for plaintiff, after a trial by the court, findings of fact being waived, he appealed. The record, however, contained no bill of exceptions or other showing of error, and defendant filed no brief or points and authorities. Held, that the appeal being manifestly without merit, $100 damages would be directed for plaintiff as part of the costs on appeal.

APPEAL from Superior Court, San Bernardino County; J. L. Campbell, Judge.

Ejectment by Jertrudes de Pena against Juan Trujillo. Judgment for plaintiff. Defendant appeals. Affirmed.

Ezra Crossman and Goodcell & Leonard for appellant; Byron Waters for respondent.

PER CURIAM.—The complaint herein is the ordinary form of a complaint in ejectment. The defendant pleaded a general denial, together with an averment that he had been in the quiet possession of the premises described in the complaint for more than five years immediately preceding the filing of the complaint. Prior to the trial the defendant filed a disclaimer of any interest in the land sued for. The cause was tried by the court without a jury, findings of fact were waived, and judgment rendered in favor of the plaintiff. From this judgment the defendant appealed directly to this court. The record contains no bill of exceptions or other showing of any error in the court below, and the appellant has not filed any brief or points and authorities in support of his appeal. The appeal is manifestly without merit, and the judgment is affirmed, and the superior court is directed to allow to the respondent $100 damages as a part of the costs on appeal.

MEYERS v. TRUJILLO.

No. 14,439; July 23, 1892.

30 Pac. 579.

Appeal Without Merit—Damages.—To a Complaint in the ordinary form of ejectment a general denial and the statute of limitations were pleaded. Findings of fact were waived, and judgment was rendered for plaintiff. Defendant, on appeal, furnished no bill of exception or other record of error, and filed neither brief nor points and authorities. Held, that the appeal being manifestly without merit, payment of $100 damages, as part of costs on appeal, would be directed for respondent.

APPEAL from Superior Court, San Bernardino County; J. L. Campbell, Judge.

Ejectment by Maria L. Meyers against Lorenzo Trujillo. Judgment for plaintiff. Defendant appeals. Affirmed.

Ezra Crossman and Goodcell & Leonard for appellant; Byron Waters for respondent.

PER CURIAM.—The complaint herein is in the ordinary form of a complaint in ejectment. The defendant pleaded a general denial and the statute of limitations. The cause was tried by the court without a jury. Findings of fact were waived, and judgment rendered in favor of the plaintiff. From this judgment an appeal was taken directly to this court. There is no bill of exceptions or other record of any error in the court below, and the appellant has not filed any brief or points and authorities in support of his appeal. The appeal is manifestly without merit, and the judgment is affirmed, and the superior court is directed to allow to respondent $100 damages, as a part of the costs on appeal.

RISING v. GIBBS.

No. 14,715; August 1, 1892.

30 Pac. 589.

Canceling Deed.—A Complaint to Cancel a Deed Alleged that defendant, without plaintiff's consent, abstracted the deed from a safe where it had been deposited by plaintiff in escrow pending the completion of a proposed sale to defendant of land therein described; that defendant after thus obtaining the deed caused it to be recorded; that no money was ever paid for the land; and defendant refused to pay the consideration or reconvey to plaintiff. Held, that the complaint showed a good cause of action.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by Charles E. Rising against E. A. Gibbs to set aside and cancel a deed to land. Plaintiff had judgment, and defendant appeals. Affirmed.

Geo. W. Glowner (Frederick Hall, of counsel) for appellant; Knight & Knight for respondent.

FOOTE, C.—This action is to set aside and cancel a deed, which it is alleged the defendant without plaintiff's consent fraudulently abstracted from a safe, where it had been deposited in escrow by the plaintiff pending the completion of a proposed sale of the land described therein to the defendant. It is further alleged in the complaint that, after getting possession of the deed in this fraudulent manner, the defendant kept it and caused it to be recorded; that no money was ever paid for the purchase of the property; that the defendant refused and still refuses to pay the consideration of the deed so fraudulently obtained and recorded, or restore the property by reconveyance to plaintiff. It is prayed that the deed be ordered delivered to plaintiff and canceled. As will be readily seen, the action is in its nature to quiet the title of the plaintiff to his property, by ordering a deed to be canceled which has surreptitiously and fraudulently come to the possession of the defendant, and had been recorded by him to

the injury of the plaintiff. We think the facts set out in the complaint show a good cause of action, and that the demurrer was properly overruled.

The point is made that the findings are not supported by the evidence. The evidence for the plaintiff fully makes out his case; that of the defendant is flatly contradictory thereto, but seems not to have had any weight given to it by the trial court. The evidence as to value of the land and the consideration for the proposed sale was proper to meet the contention of defendant that the consideration paid for the land described in the deed was the sum of $332.95, a small and inadequate price for it, and which the evidence showed on the trial was a store account owed by plaintiff to defendant. We perceive no error whatever in this record, and are of opinion that the appeal is totally devoid of merit, and advise that the judgment and order refusing new trial be affirmed.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order refusing a new trial are affirmed.

KELLEY v. OWENS et al.

No. 13,804; August 3, 1892.

30 Pac. 596.

Fraud—Shifting of Burden of Proof.—Plaintiff asked that an agreement made by her to convey land to defendant for stock in an iron and steel company be canceled, alleging that defendant induced her to make the contract by representing that a new method had been discovered for the cheap manufacture, at a great profit, of a superior quality of fine steel and iron, for which invention a caveat had been filed, and that this company had been formed for the manufacture of steel under this process; which representations plaintiff alleged to be false, and known by defendant so to be. Held, that as these were negative allegations, but little was necessary to shift the burden of proof to the party having the best opportunities for knowledge of the facts, and that testimony of an expert that the process, as given in the caveat, would not produce steel, was sufficient to place on defend-

ant the burden of proving the truth of the representations made by him.[1]

Fraud—Evidence in Defense.—In such case, if the representations made by defendant were false, he cannot show that plaintiff did not rely on them by evidence that plaintiff investigated the matter for herself, and expressed herself as fully satisfied, when such investigations consisted merely in asking information from persons to whom she was referred by defendant, and who knew and could know nothing of the process, except what they were told of it by him.[2]

Fraud—Evidence of Other Frauds.—Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible.[2]

APPEAL from Superior Court, Contra Costa County; R. Crouch, Judge.

Action by Mrs. H. S. Kelley against William Owens, executor, and Helen M. Owens. From a judgment for defendants, and an order denying a motion for a new trial, plaintiff appeals. Reversed.

D. M. Delmas (Bull & Cleary of counsel) for appellant; Garret W. McEnerney and George Maxwell for respondents.

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[1] **Cited** and followed in Del Vecchio v. Savelli, 10 Cal. App. 81, 101 Pac. 33, an action for damages for fraudulent representations whereby one had been induced to buy an interest in barber shops.

Cited and followed in Kornblum v. Arthurs, 154 Cal. 248, 97 Pac. 421, for rescission of a contract for the purchase of land, on the ground that the plaintiff had been induced to enter into it through false and fraudulent representations.

[2] **Cited** and followed in People's Bank of Minneapolis v. Reid, 86 Kan. 250, 120 Pac. 341, in admitting evidence of other transactions to show system, motive or intent on the part of a company in a suit on a contract the defendant was induced to enter into through fraudulent representations.

Cited, along with other cases holding to a similar effect, in Ogden Valley Trout & Resort Co. v. Lewis (Utah), 125 Pac. 692, as opposed to other cases there cited in which courts have held to a contrary effect.

Cited and followed in People's Bank v. Reid, 86 Kan. 250, 120 Pac. 341, where the court adopts language used in Elerick v. Reid, 54 Kan. 579, 38 Pac. 814, thus: "Surely, the attempted dealings of the defendant with other persons, in which he undertook to make the same kind of a bargain as that made with the plaintiff, are well calculated to explain his motives in this transaction."

HAYNES, C.—This was a suit in equity to rescind and cancel an agreement for the sale of land made by appellant with said H. K. Owens, and a conveyance to him of said land pursuant to said agreement. H. K. Owens died after the commencement of the action, and the executor of his estate was substituted. Helen M. Owens, the wife of H. K. Owens, was made a party originally, because of the conveyance of said land to her by her husband. Defendants had judgment, and this appeal is taken from an order denying appellant's motion for a new trial.

Appellant was the owner of 480 acres of land in Colusa county, alleged to be of the value of $20,000, and found by the court to be of the value of $17,000; and on June 5, 1884, entered into a contract with H. K. Owens, by which she agreed to convey said land to him in consideration of 55,240 shares of the capital stock of the Pacific Coast Steel and Iron Manufacturing Company. The said stock was transferred to appellant immediately after said contract was made, and on the 14th of June, 1884, appellant conveyed said land to said Owens. The complaint alleged, in substance, that said Owens, in order to induce plaintiff to exchange said land for said stock, represented that one "Lee was the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel and merchantable iron from pig iron and other iron and iron ore"; that said Lee had secured the right to have his said invention patented; that he (Owens) had aided and assisted Lee in obtaining said right to a patent, and in forming a corporation for the manufacture of said steel by said process—which representations she alleged were false, and known so to be by Owens; that she relied upon them, and believed them to be true, and was thereby induced to enter into said contract and make said conveyance. The complaint further charged that Lee and Owens confederated together to form said corporation for the purpose of defrauding plaintiff and other purchasers of stock, and, in pursuance of said design, made representations similar to those above recited, all of which averments were denied in the answer. The court found the contract, conveyance, and transfer of the stock as alleged. The findings upon the other allegations, upon which issues were raised, are very full, cov-

ering seven pages of the transcript. These findings are to the effect that H. K. Owens did not, for the purpose of inducing the plaintiff to make the conveyance or otherwise, represent that Lee was the discoverer or inventor of the said process, but that he did represent that he "believed Lee was the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel and merchantable iron, from pig iron and other iron and iron ore." The findings further show that Owens represented to plaintiff that Lee had filed a caveat for his said invention; that Owens had advanced from time to time large sums of money to Lee to enable him to perfect his invention, and manufacture specimens of steel; that he had aided Lee in forming said corporation; and that his representations were true. The court further found "that said Lee was, at all times alleged in the amended and supplemental complaint mentioned, the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel and merchantable iron, from pig iron and other iron and iron ore." It was further found that the representations made by Owens to plaintiff were none of them false, or known or believed by Owens to be false, but that each of them was true, and known and believed by Owens to be true; that the plaintiff did not rely upon said representations, or any of them, in making said contract and deed, and was not induced thereby to do so. Appellant, in her motion for a new trial, attacked nearly all of the findings, including those above mentioned, upon the ground that they were not justified by the evidence.

Many witnesses were examined, and the testimony is voluminous. I think the findings in several particulars covered by appellant's specifications are not sustained by the evidence. Some general facts disclosed by the evidence, and not controverted by counsel, may be first stated. In 1883, Dr. Lee claimed to have discovered the process mentioned in the complaint for the manufacture of steel. He was without financial ability to conduct experiments necessary to perfect his alleged discovery; as Owens stated to the witness Cousins, he (Lee) was very poor, that he had nothing, that he (Owens) furnished him means, and, he thought, even bought him clothes. Under these circumstances, Mr. Owens furnished Lee

a laboratory in the city of San Francisco, where for some time he prosecuted his experiments, and then a plant at Melrose was secured, where it was claimed steel was made by Lee's alleged process. This plant was afterward moved to Martinez, for the purpose of securing better freight facilities, and where a larger plant was to be and was in part erected. In the meantime, in October, 1883, Lee and H. K. Owens organized the corporation known as the Pacific Coast Steel and Iron Manufacturing Company, with a capital stock of 215,000 shares, of the par value of $5 each, and of which stock the complaint alleges, and it is not denied, Lee and Owens had issued to them 115,000 shares, and of which corporation Lee was president and Owens treasurer; three other persons, with Lee and Owens, constituting the board of directors.

1. The representation that Lee was the discoverer and inventor of a new method for the cheap manufacture, at great profit, of a superior quality of fine steel, whether true or false, or whether made positively, or upon belief merely, lies at the foundation of this controversy. The fifth finding is that H. K. Owens did make that representation to plaintiff, but that it was made upon belief, while the tenth finding is that it is true; and, if true, it is immaterial whether it was made as the positive assertion of a fact, or merely as an assertion that he believed Lee was the discoverer of such new process or method. This representation was very comprehensive. It was not merely the discovery of a method of making steel, but of a new method for the cheap manufacture, at a great profit, of a superior quality of fine steel. Then, as now, the manufacture of steel was a great industry. Methods of its manufacture had long been known. The opportunity for anyone to engage in its manufacture by methods theretofore known was open, but by such methods the new manufacturer must compete on not more than equal terms with those who then occupied the field. The inducement, therefore, to engage in this enterprise was a new method, a cheap one, affording large profits, while the product was superior, thus assuring a ready market, and in addition that a caveat protecting the discovery had been filed, thus securing the corporation against competition in the use of the same process. In order, therefore, to justify the tenth finding, something more must ap-

pear than that Dr. Lee discovered a method theretofore unknown to him, by which he could make steel; but the method must be new, in the sense that it was unknown to and unused by all others engaged in the manufacture of steel, while the cheapness of the method, insuring large profits, and the superior quality of the steel, were equally potent elements in recommending it to the favor of investors. The evidence bearing upon the proposition that such discovery or invention was not made by Dr. Lee is voluminous, and is found in parts of the testimony of many witnesses. The alleged discovery or invention is described in the caveat filed by Dr. Lee in the United States patent office, under date of April 12, 1884, copy of which appears in the transcript. Patrick Noble, a witness called on behalf of the plaintiff, testified that he was superintendent of the Pacific Rolling Mills, had been in that business eight years, and was familiar with the manufacture, composition, and handlings of metals, including steel; that he had made a study of that subject, and was familiar with the different processes of making steel that are known to the world; that he had seen the caveat which was in evidence, and had carefully examined the drawing attached to it; that the caveat does not describe any method whatever of making steel; that steel could not be made by following the directions contained in the caveat; that it would spoil the metal; that putting a warm blast on top simply burns the metal; that if the air is put in the metal it would make steel, but would be an infringement of the Bessemer process; that none of the fluxes used are calculated to make steel. No experts were called to contradict this testimony of Mr. Noble. Mr. Hatton, who was in charge of the rolling department in the Pacific Mills, testified that Dr. Lee brought some steel there, that he rolled it for the doctor, but he did not know where it came from. The only thing tending to identify it was that it appeared to have been cased in a railroad bar, or something like that; and defendants' witness Holland testified that he was in Lee's employ, that he was with him at Melrose, that he remembered of steel being sent to the rolling mills, that it was run in a railroad bar, but that he did not see the chemicals put in. This testimony therefore raises no conflict with the testimony of Mr. Noble. It only shows that steel of some quality was made by Dr. Lee at Melrose, but by what method

or process, new or old, cheap or expensive, does not appear. Both Mr. Owens and Dr. Lee exhibited to appellant and others at Martinez specimens of what was represented by them as steel made by Dr. Lee's process at Melrose.

One of plaintiff's witnesses, Alfred F. McMillan, a blacksmith who had worked at his trade continuously more than twenty years, testified that Owens exhibited to him three different pieces of metal professed to be manufactured by Lee's process, and he found them to be common Bessemer steel. This witness further testified that Owens afterward gave him a piece of waste metal and asked witness to test it, and told him it was manufactured the same as the others; that he tested it, and informed Owens that it was only a piece of pig iron decarbonized a little; that it could not be rolled nor hammered; that it was worthless. At this time Owens further said to the witness "the process of manufacturing steel was a secret between him and Dr. Lee"; and Owens then requested witness "not to say anything about it, so as people should not think anything wrong was going on, as I understood." The witness further testified that Lee came to him, and asked if he did not have a piece of steel. "I told him I did,—two pieces of iron,—of those bars Mr. Owens gave me. He asked me what I thought of the steel. I told him it was an ordinary grade of open hearth or Bessemer steel. During the conversation I broke off a piece of this steel and a piece from an old plowshare, and bet the doctor a new hat if he could pick out his from the two pieces, and the doctor said it was hard to tell." Ostello, a witness for appellant, testified that three pieces of steel of different grades were brought to him, that Robbins and Perrin tried some, and both reported to him that it was good. Other witnesses, among them Patrick Noble, examined and tested these specimens—some of them were undoubtedly steel. One bar, Noble testified, "was steel; that it looked like tool steel; that is, high in carbon. That it was an article well known to commerce, coming from Damascus, and has been for centuries, two or three," and "that it was not different from merchantable steel known to commerce for fifteen years or more." I find in the record, however, no evidence, beyond the representations of Lee and Owens, that these specimens of steel were made at Melrose, or, if made there, that they were made by the process alleged

to have been discovered by Lee, nor that, if so made, that the process was cheap, or resulted in the manufacture of a superior quality of steel. It cannot be said that these representations were evidence of the fact stated in the findings under consideration, or that it in a legal sense conflicts with the testimony of Noble, that the formula shown by the caveat filed by Lee would not produce steel.

It may be added, however, that Owens, in a conversation with the witness Cousins, after this suit was brought, said that he did not know that Dr. Lee had ever made that steel; that he never saw him make it; that Dr. Lee might have bought it, or got it from some other source. The witness further said he referred to the steel that was exhibited by Lee and Owens to induce stockholders to subscribe for stock. There was some metal that was called "steel" by Dr. Lee and others, made at Martinez, and which was also referred to by the appellant in a letter to Mrs. Paddock, put in evidence by respondent; but upon examination it will be found that all the statements or expressions, in regard to the manufacture of steel at that place, were simply repetitions of Lee's statements; while the witness Williamson, an iron founder and machinist of thirty-five years' experience, and who was employed by Dr. Lee about the 1st of June, 1884, at the works in Martinez, and who cast the battery shoes represented to be of steel, testified as follows: "I went there some time after Mr. Owens left, and after this lady [Mrs. Kelley] bought her stock. I think that was about the beginning of June. From that time I remained there in charge of the works up to the time that Dr. Lee left. During the time I was there, there was not any steel made at those works. Dr. Lee claimed these stamps and dies that I have spoken of to be steel, and he claimed that it was produced by the use of his chemicals. He either put in the chemicals himself or had someone else. . . . . On one heat there was none put in, as I said before. That was the heat I ran, which was the last one. While I was there I urged Dr. Lee to make steel." Again the witness said: "From my observation of Dr. Lee during the time while I was there, as an expert I say that he didn't manifest any knowledge of working that iron and steel. . . . . I did not see any evidence or any trace of any new process of manufacturing steel during the time I was there. . . . . The doctor professed to be making

steel out of the cupola, and made what he termed to be steel, but I could see no steel about it. . . . . I tested it by heating it and trying to work it, and I pronounced it as not steel, ... if it has got to be a direct answer." Mr. Bunker, another witness, testified that he urged Dr. Lee to make some of his fine steel, to which the doctor replied that he would not till he got ready. It may also be added that some time in August, 1884, Dr. Lee abandoned the enterprise, as it appeared, and, so far as the record shows, was never heard of by those interested afterward. Counsel for respondents do not contend that Lee did discover such process, but say that the evidence upon this point was not deemed satisfactory by the court, and it therefore prefaced the findings by the statement that the allegation that Lee was not the discoverer of such new method, etc., "is not sustained by the evidence, and the court therefore finds," etc. The only comment made by respondents' counsel upon this finding is "that the testimony is such as would not ordinarily produce material [moral?] certainty or conviction in an unprejudiced mind." It is true the burden was on appellant of proving her negative allegation, that being the foundation of her action. The degree of proof of a negative allegation is seldom measured by that required of an affirmative allegation. In some cases a negative may be positively and conclusively proved, and in such cases the general rule laid down in section 1869, Code of Civil Procedure, must be complied with; but in many cases this is impossible, and hence the amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slight evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into: Steph. Dig., art. 96; United States v. Southern Colorado Coal etc. Co., 18 Fed. 273, 5 McCrary, 563.

It is perfectly clear that appellant made all the proof of her negative allegation that the nature of the case and the rules of evidence required. The witness Noble, whose learning and experience qualified him to testify as an expert, and whose competency was not questioned, testified that the method or process given in the caveat would not produce steel. That, without anything more, was quite sufficient to shift the

burden of proof to the other side. If it had been met by the testimony of another expert that it was a new method, and would produce steel profitably, there would have been a material conflict in the testimony; or if it had been shown that Lee's process had, by actual test, shown that steel could be produced by it of a superior quality, cheaply and profitably, and that the method was new, the great preponderance of the evidence would have been with respondents; and that evidence they were bound to produce, if it existed. Appellant, however, did not rest upon that, as she might have done, but proved by Williamson, who was in charge of the works at Martinez under Lee, that what Dr. Lee called steel, made by his process, was not steel. The bars of steel exhibited and tested at Martinez, and which were represented by Lee and Owens to have been made by this process at Melrose, were not proved to have been so made, and therefore raised no conflict in the evidence.

As to the finding that these representations which were made by Owens to the plaintiff were made only upon his belief, little need be said. Appellant testified positively that Owens' statements were made positively and repeatedly; that he exhibited to her specimens of steel which he asserted were made by Lee by his new method. About the same time, and before, as well as after, he made the same statements to Cousins, Barry, Bunker and others. But it is claimed on behalf of respondents that appellant's testimony is contradicted by Mrs. Paddock, who was present at the first conversation between appellant and Owens. That conversation was at Mrs. Paddock's house, early in April, when Mrs. Paddock was trying to sell to appellant 200 shares of the stock in this corporation, and had called in Mr. Owens and introduced him to appellant as one "who knew all about it." It is not necessary to discuss the want of probability, under all the circumstances, of Mrs. Paddock's statement that Owens said he "believed Lee had invented the process and had made the steel which he exhibited, inasmuch as that was a different transaction, not involved in this suit. Appellant bought Mrs. Paddock's shares in April, and afterward, in June, exchanged her farm for the stock owned by Owens. It is conceded by respondents' counsel that, after appellant purchased Mrs. Paddock's stock, Mr. Owens may have changed the form of

his representations from "belief" to that of an absolute fact, when he came to negotiate a sale of his own stock. If it be true that he did, the former representation can have no weight. Appellant's testimony shows that Owens called upon her many times after her purchase of Mrs. Paddock's stock, and made these representations as statements of fact, and urged her to visit Martinez and see the works, and there showed her specimens of steel, which he declared in Lee's presence was made by Lee by his process, and "that is our make of steel," and made other expressions of like character, and also informed her that he had the formula of Dr. Lee, but did not know that he could make the steel himself without experiment; all which statements and occurrences, subsequent to the first conversation at Mrs. Paddock's, are wholly uncontradicted. It is true that at the time she gave her testimony Mr. Owens was dead, and could not, therefore, contradict her. That fact should require the court to scrutinize her testimony, but could not authorize such distrust of it, if otherwise reasonable and probable, as to seriously diminish its weight. The same positive statements were made to others before, and at about the same time, in reference to the same facts, and while inducing others to take stock in the corporation. This testimony, counsel for respondents contend, was irrelevant, and, even if admitted by the court below without objection, should not be considered here. The cases cited by respondents' counsel are not in point; with one exception these were criminal cases, and the evidence held irrelevant was of other, distinct offenses, of the same character. In criminal cases, where the knowledge of the defendant is an essential ingredient of the offense, other offenses of the same character may be shown, as, for example, where the offense charged was that of passing a counterfeit bill, it is competent, for the purpose of showing that the defendant knew it was counterfeit, that about the same time he passed other counterfeit bills of like character, which were known to him to be counterfeit. Cases of fraud are, however, exceptions to the general rule. In Lincoln v. Claflin, 7 Wall. (U. S.) 138, 19 L. Ed. 106, the court said: "On the trial declarations of the defendants were received, which related, not merely to the transaction which is the subject of inquiry in this action, but to similar contemporaneous transactions with other parties. The evidence was not in-

competent or irrelevant, as contended by counsel. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible": See, also, Cary v. Hotaling, 1 Hill (N. Y.), 311, 37 Am. Dec. 323.

The only other finding necessary to be noticed is the fifteenth, viz.: "That said plaintiff did not rely upon said representations, nor upon any thereof, in making said contract or deed, nor was she by said representations, or any thereof, induced to make said contract or deed." Appellant, after testifying fully to the representations made to her by Owens, testified that she had never been engaged in the business of manufacturing steel or iron of any kind; that she knew nothing about it further than had been represented to her by Mr. Owens; that she believed his representations, and relied and acted upon them in making the transfer of the land to him. It is not necessary that we should repeat these representations. The only testimony in the case tending to show that appellant did not rely upon the representations made to her by Owens was the testimony of Mr. James F. Stewart, an attorney, whose son, also an attorney, occupying the same office with his father, drew up the contract between appellant and Owens. Mr. Stewart testified that while the contract was being drawn Mr. Owens left the office, and he took occasion to ask appellant if she knew the facts connected with the matter, and she replied that she did; that she had informed herself fully; that she had received her information from parties at Martinez; that she was competent to make the agreement; and that she got her information outside of Owens. The uncontradicted evidence in the case, however, shows that up to the time this agreement was entered into no one at Martinez, except Dr. Lee and Owens, knew anything about the matter, except from the representations of those two men; and further shows that others could not have known anything about the alleged process otherwise. Therefore the invitations of Owens, repeatedly given to appellant, to go to Martinez and investigate, was an invitation to hear from others the representations he had made them, and in so doing simply repeated to her the representations he had made to her before, but in such manner as to greatly strengthen her confidence in him. While, therefore, to Mr. Stewart, who

knew nothing of the situation at Martinez, it might appear that appellant had fully investigated the subject, and did not rely solely or principally on Mr. Owens' statements, in the light of the record, his testimony does not raise a material conflict. My conclusion, therefore, is that the findings referred to are not justified by the evidence. The testimony of Mr. Stewart should have been excluded, and the court erred in receiving it, in the light of the circumstances shown by the record; but whether the appellant was prejudiced thereby to such extent as to justify a reversal upon that ground alone it is not necessary to decide.

Respondents' counsel have argued at considerable length that appellant's complaint does not state facts sufficient to support a judgment in her favor, and contend that for that reason the order denying a new trial should be affirmed, regardless of error. In this case there was no appeal from the judgment, and it is well settled that the sufficiency of the pleadings cannot be considered on appeal from an order denying a new trial: Brison v. Brison, 90 Cal. 323, 27 Pac. 186, and cases there cited. I think the order should be reversed and new trial granted, with leave to the plaintiff to amend her complaint if she desires, and so advise.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed and new trial granted, with leave to the plaintiff to amend her complaint if she desires.

ON REHEARING.

September 2, 1892.

PER CURIAM.—The petition for rehearing is denied, but the following paragraph is eliminated from the opinion:

"The testimony of Mr. Stewart should have been excluded; and the court erred in receiving it in the light of the circumstances shown in the record; but whether the appellant was prejudiced thereby to such an extent as to justify a reversal upon that ground alone, it is not necessary to decide."

NAFTZGER v. GREGG et al.*

Nos. 14,705, 14,704; August 4, 1892.

31 Pac. 612.

Bills and Notes — Pleading.—In an Action on Two Notes the answer admitted the allegations in the complaint, but set out a contract for a deed to defendant from plaintiff, with the averment that the execution of the contract and the making of the notes were parts of the same transaction, and that the contract was the only consideration for the notes, and that no deed had been tendered by plaintiff. Held, that the complaint was defective, and presented no cause of action, in that it did not set out the contract, and allege performance by plaintiff of its conditions.

Bills and Notes—Res Judicata.—Where a Judgment for Defendant has been rendered in an action on notes because the complaint did not set out the contract under which the notes were given, and allege performance of its conditions, which performance was necessary for a recovery upon the notes, and where there is no issue tendered in the complaint or answer as to the performance of this condition, this judgment is no bar to an action on the notes and the contract.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Two actions by A. N. Naftzger against W. F. Montague and others on two promissory notes. From a judgment for defendants in both actions, plaintiff appeals. Affirmed as to one action and reversed as to the other.

E. B. Stanton and Chapman & Hendrick for appellant; Goodcell & McIntyre for respondents.

VANCLIEF, C.—The above-entitled causes between the same parties and relating to the same subject matter will be considered together for convenience, if not of necessity. As No. 14,705 was first tried, it will be first stated. It is an action upon two promissory notes made by the defendants, each for $2,500, dated September 8, 1887, one payable one year, and the other two years, after date. It was commenced March 10,

*For subsequent opinion in bank, see 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 575.

1890. The complaint is in two counts in the usual form, and is, on its face, sufficient. The answer of the defendants expressly admits each and every allegation of the complaint, but alleges that there was no consideration for said notes, or either of them, other than a written contract of even date with the notes, whereby the plaintiff agreed to sell and convey to the defendants, and the defendants agreed to buy from plaintiff, a certain lot or parcel of land, and to pay therefor $7,000—$2,000 upon the execution of the contract, $2,500 in one year, and $2,500 in two years, from date of contract; the deferred payments being evidenced by the two notes described in the complaint. A copy of the contract is exhibited as a part of the answer, and contains the following: "In the event of a failure to comply with the terms hereof by the said parties of the second part [defendants] the said party of the first part shall be released from all obligations in law or equity to convey said property, and said parties of the second part shall forfeit all right thereto; and the said party of the first part, on receiving such payments at the time and in the manner above mentioned, agrees to execute and deliver to the parties of the second part, or to their assigns, a good and sufficient deed conveying said land free and clear of all encumbrances made, done or suffered by the said party of the first part; . . . . and that time is of the essence of this contract." The answer further alleges that the defendants paid $2,000 at the time the contract was executed, and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof." The court found as facts the execution of the contract; that defendants paid thereon, at the time it was executed, $2,000; that the notes in suit were given at the same time, as a part of the same transaction; and that "the plaintiff has not executed to the defendants the deed provided for in said contract, or any deed of conveyance of said land, or any part thereof"; and as conclusions of law found "that the plaintiff is not entitled to any relief in this action," and "that the defendants are entitled to judgment against the plaintiff for their costs"; and rendered judgment accordingly on July 29, 1890. The plaintiff appealed from this judgment on July 9, 1891, upon the judgment-roll, without a bill of exceptions.

No. 14,704 is an action (commenced October 11, 1890) upon the same two promissory notes to recover the amount alleged to be due thereon, and to enforce the vendor's lien upon the lot described in the contract of sale. The complaint differs from that in the former action (No. 14,705) only in that it sets out the contract of sale, alleges that the notes were made to secure the unpaid purchase money, and "that, after the maturity of said promissory notes, and before the commencement of this action, the plaintiff tendered to said defendants a good and sufficient deed conveying to the defendants the said premises described in the said agreement, free and clear of all encumbrances made, done, or suffered by the plaintiff, ... and at the same time demanded of said defendants payment of the said promissory notes; but that said defendants then refused, and ever since have refused, to accept the said deed, and then refused, and ever since have refused, to pay the said promissory notes, or any part thereof"; and "that at the time of the maturity of said promissory notes the plaintiff was, and ever since has been, and still is, ready, willing and able to carry out and perform his said agreement on his part, and to deliver to said defendants a good and sufficient deed conveying said premises to said defendants free and clear of all encumbrances made, done or suffered by the plaintiff; and he hereby offers to deliver such deed upon payment of said notes." In their answer to this complaint the defendants "admit each and every averment thereof, except that as to the averment that the plaintiff was and is the owner of the land described in said amended complaint these defendants are not sufficiently informed to enable them to answer the same, and therefore they deny that the plaintiff was at any of the times mentioned in the complaint, or that he now is, the owner of said land, or able to convey a good title thereto to defendants." For a further answer they pleaded the former judgment in the above-entitled cause, No. 14,705, as a bar to this action. The plaintiff demurred to each branch of the answer on the ground that it stated no defense. The demurrer was overruled, and the cause was tried by the court. The court found as facts that the former action was between the same parties and for the same cause, and that it was therein adjudged and determined that the averments of the answer therein were true, that the plaintiff had failed to per-

form said contract of sale on his part, and that he was not entitled to any relief against the defendants on account of said notes or the purchase price of said land; and as a conclusion of law found that by the judgment in the former action the plaintiff is estopped from maintaining this action; and accordingly rendered final judgment in favor of defendants on July 7, 1891. From this judgment plaintiff appealed on July 9, 1891, upon the judgment-roll containing a bill of exceptions.

1. On the appeal from the former judgment (No. 14,705) the appellant contends, in substance, that no defense to the action was either pleaded by defendants or found by the court, and that plaintiff was entitled to judgment upon the pleadings and findings of fact. It is true that the averment in the answer that the plaintiff had not executed to defendants the deed provided for in the contract, and the finding of the court that this averment was true, were entirely immaterial, since the plaintiff was under no obligation to execute the deed until the purchase money was tendered or paid, and could not be put in default without a tender of the purchase money by the defendants: Englander v. Rogers, 41 Cal. 420; Newton v. Hull, 90 Cal. 487, 27 Pac. 429. But the setting out of the contract, and the averment that the execution of the contract and the making of the notes were parts of the same transaction, and that the contract was the only consideration for the notes, were material, since it thereby appeared that "the covenants of the vendor and vendee were mutual and dependent, and neither could put the other in default, except by tendering a performance in his own part, unless the other party either waived the tender, or by his conduct rendered it unnecessary": Englander v. Rogers, supra. And also that the complaint was defective in that it did not set out the contract of sale, nor aver that plaintiff had tendered to defendants a deed of the land. The averment of this new matter in the answer was a complete defense to the prima facie cause of action stated in the complaint, and the finding by the court that this new matter was true supports the judgment. It may be that the plaintiff might have obtained leave to amend his complaint by adding the averment that he had tendered a deed before the commencement of the action, if the fact had been so. But, for some reason which does not appear, he did

not so amend his complaint. There was no averment in the pleading of either party, and consequently no finding, as to whether or not the plaintiff had tendered a deed; yet facts were pleaded by defendants, and found by the court, from which it resulted as a legal conclusion that the plaintiff had no cause of action. The plaintiff had failed to set forth that part of the contract which required him to tender a deed as a necessary condition of his right to recover on his notes, and also failed to state that he had performed that condition; and the new matter stated in the answer only partially supplied the deficiency, as it contained nothing in respect to a tender of the deed. It devolved upon the plaintiff to allege and prove that he had tendered a deed; otherwise it did not appear that the defendants were in default. The authorities, in addition to those above cited, which I think warrant this conclusion, are numerous, and a large collection of them may be found in 2 Bingham on Real Property, page 716, chapter 12 et seq.

2. On the appeal from the subsequent judgment (No. 14,704) the appellant contends, first, that his demurrer should have been sustained to that part of the answer which denies that plaintiff was the owner of the land he agreed to sell to defendants, or able to convey a good title thereto, and puts the denial on the ground that "these defendants are not sufficiently informed to enable them to answer the same." Section 437, Code of Civil Procedure, provides: "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." It seems obvious that the denial in this case is not in substantial compliance with the code, since it does not state that defendants have no belief on the subject sufficient to enable them to answer. But I think the point is of no importance, for the reason that the court made no finding upon the issue attempted to be made by this denial, and placed its decision solely upon the ground that the former judgment is a bar to this action. But the principal point relied upon for a reversal of this judgment is that the evidence does not justify the finding "that the cause of action alleged in the complaint was adjudicated and determined by the prior judgment," and I think this point should be sustained. The only evidence

having any tendency to prove this finding was the judgment-roll in the former action; and, as we have seen, the only material issues taken or tendered by the answer in that action related to the execution of the contract of sale, and the relation of that contract to the notes upon which that action was brought, it being alleged in the answer that the notes and the contract were executed at the same time, as parts of the same transaction, and that the contract was the only consideration for the notes, so that the notes and the contract were mutually dependent upon each other, and really constituted only one contract. Upon the issue thus tendered the court properly found for the defendants, and there is no exception to this finding. By the exhibition of the contract as a part of the answer not denied it was made to appear that, in order to put the defendants in default as to payment of the notes, the plaintiff was bound to tender (though not to execute) a deed for the land. As to whether the plaintiff tendered a deed before the commencement of that action, there is no allegation in the pleadings, and consequently no issue and no finding. Still, upon the findings that were made, the plaintiff, as above shown, was not entitled to recover on the notes; not, however, because it was determined by the court that he had not tendered a deed, but only because his complaint was defective in that it did not set out the whole contract and allege that plaintiff had tendered the deed. But, as this defect did not appear upon the face of the complaint, it could not have been reached by demurrer. It therefore became necessary for the defendants to set forth the omitted branch of the contract, as they did; and they might have gone further, and averred that plaintiff had not tendered a deed, and thus have tendered an issue upon which the decision of the court would have been conclusive as to whether the plaintiff had tendered a deed: Gilmore v. Insurance Co., 55 Cal. 123; Schenck v. Insurance Co., 71 Cal. 28, 11 Pac. 807. But in addition to setting out the omitted part of the contract, the defendants only averred that the plaintiff had not executed the deed. This averment was immaterial. In the former action there was no issue, no admission by the pleadings, nor any finding by the court, as to whether plaintiff had tendered a deed. Nor was it necessary to the judgment rendered in that action that there should have been a finding,

either express or implied, upon that question. Counsel for respondents contend, however, that under the pleadings that question might have been tried and determined, and that the judgment is conclusive upon all questions which might have been tried, although not expressly decided. But the judgment-roll in the former action furnishes no ground for an implication or presumption that there was any trial or determination as to whether plaintiff tendered a deed. As to that matter the pleadings and the findings are silent, and no decision in regard to it was necessary to sustain the judgment rendered. Under these circumstances, there is not only no presumption that the question was tried, but the record shows that it could not properly have been tried: Meredith v. Santa Clara etc. Assn., 56 Cal. 178. I think the former judgment (No. 14,705) should be affirmed, but that the latter judgment (No. 14,704) should be reversed, and the cause remanded for a new trial.

We concur: Haynes, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion it is ordered that the judgment in Naftzger v. Gregg et al. (No. 14,705) be affirmed, and that the judgment in Naftzger v. Montague et al. (No. 14,704) be reversed, and said last-named cause be remanded for a new trial.

BARROWS et al. v. FOX et al.*

No. 14,643; August 6, 1892.

30 Pac. 768.

Waters — Waste.—Under Civil Code, Section 1411, providing that an appropriation of running water, to give a right to its use, must be for some useful or beneficial purpose, and that when the appropriator ceases to use it for such a purpose the right ceases, where it is adjudged that plaintiffs are entitled to a certain amount of water from a stream, and that defendants are entitled to the remainder, and it appears that plaintiffs have always used the water by means of a defective flume, the court may direct them to carry

*For subsequent opinion in bank, see 98 Cal. 63, 32 Pac. 811.

the water to which they are entitled by flume and pipe, so that the rest may not be wasted.

Waters—Regulation by Court of Use.—Where, in an action to establish right to water in a stream, a court of equity finds, on sufficient evidence, that the parties have each certain rights in the stream, it may secure enjoyment of those rights by proper regulation of the use of the water.

Waters—Injunction.—Where, in an Action to Establish a water right in a stream, defendants, claiming as appropriators, ask for an injunction to restrain plaintiffs from taking any water from the stream, it is permissible for defendants to show the effect on their lands, as to value, of a deprivation of water as asked by defendants, and that there is no other available water supply, since this might be necessary to entitle them to the relief asked.

APPEAL from Superior Court, Ventura County; B. T. Williams, Judge.

Action by Thomas Barrows and others against Lewis C. Fox and others. From a judgment adjusting the rights of the parties, and an order refusing a new trial, plaintiffs appeal. Affirmed.

Blackstone & Shepherd (Chapman & Hendrick of counsel) for appellants; H. L. Poplin for respondents.

FOOTE, C.—The plaintiffs claim to be the owners and tenants in common, and entitled to the possession, of a certain "water ditch, conduit, flume and waterway," by means of which certain waters flowing from a spring in what is called "Brunson Canyon" are conducted, together with the right of way for the same, over certain lands of which description is given. They also claim, in connection with the right of this waterway, that as tenants in common they own, as prior appropriators for use for "stock, domestic and irrigating and other useful purposes," all the water flowing from the spring in question, to the extent of two hundred inches of water, under a four-inch pressure. They assert that they have thus used these waters, for about thirteen years, adversely to the whole world. That the defendants, about the 15th of July, 1890, took and appropriated all the waters of the natural stream which came from the spring above the plaintiffs' ditch and prevented the plaintiffs from enjoying the use of the

waters they had appropriated, and that the defendants threaten to continue to deprive the plaintiffs of their rights in the premises, and will do so if not restrained by injunction. Damages are asked for in the sum of $2,000; that the court will decree that the plaintiffs are the owners of the water right claimed, and entitled to the right of way set up for the water ditch, etc.; and that the defendants be restrained from all wrongful acts, etc.

The defendants deny the claim of the plaintiffs to the water right set up in the complaint, and allege that the defendants are entitled to the use of the waters of the spring flowing by a natural watercourse through their lands, which waters are less in quantity than fifty inches, measured under a four-inch pressure, and that they, claiming themselves to be the owners of the waters in dispute, did appropriate them for necessary beneficial purposes of irrigation and domestic use. The court found in the first finding, in effect, that the plaintiffs were entitled to use their ditch, flume, etc., to convey the waters necessary for the useful purposes for which the plaintiffs had appropriated them, and to the right of way for the ditch, etc.; but in the third finding found that the appropriation for beneficial use by plaintiffs was not two hundred inches of water as alleged in the complaint, but that, as owners and tenants in common of the right to use the waters of the stream in controversy for irrigation upon their lands, they were the owners and entitled to the use of the waters for that purpose "during the months of June, July, August, September, October and November of each year, such months being the season for irrigation in that locality, for the period of fifteen successive days only of each of said months, from the first to the fifteenth days thereof, both inclusive, to the amount of one hundred and sixty thousand two hundred and ten United States gallons per day, equal to eleven inches, measured under a four-inch pressure." And that they were the owners and entitled to the use of the waters in controversy for domestic and stock purposes only "to the amount of water that will flow through a pipe three-quarters of an inch in diameter, under a four-inch pressure, laid from the place of diversion on said stream to the land aforesaid of plaintiffs, continuously each day, or so much thereof as is reasonably necessary on said land for such purposes." But

that they were not the owners of any greater water rights in the waters flowing from the spring and in the natural watercourse in question. The court in finding 4 further found that the defendants first, by closing up the plaintiffs' ditch, wrongfully deprived them of these water rights; but in finding 7 it found that one of the defendants, Mr. Fox, had, as a subsequent appropriator to plaintiffs, perfected his appropriation of fifty inches of the waters in controversy, which rights he held, of course, subject to that of plaintiffs; and in the eighth finding that the lands of defendants Fox and Crouch are those of riparian proprietors, and that they are entitled, as subsequent appropriators to the plaintiffs, to the use of the waters of the stream flowing in its natural course through such lands for purposes of irrigation and domestic use, subject only to the right of plaintiffs as above defined; that Fox is entitled to thirteen-sixteenths of this restricted water right; that the waters are necessary alike for the beneficial uses of both parties to the action, their lands being agricultural, and that no damage has resulted to either party. The conclusions of law follow, based upon these findings, and the judgment is given and made in substantial accord therewith.

The main contention of the plaintiffs for a reversal of the judgment and order refusing a new trial is that the judgment is not sustained by the findings, in respect that the court has undertaken to direct them, contrary to principles of equity pertinent to the facts of the case, to substitute a pipe for a ditch or flume in which to carry the waters necessary for the purposes of the beneficial use to which they have applied the waters. They say that, as they have used these waters by ditch or flume for thirteen years, they have the right still to use them in that way, even if these conduits leak and waste all the water over and above that necessary for their beneficial use; that inasmuch as they have thus used the water, and had the right of way for the same by ditch or flume, the court can place no restriction on these uses which will prevent them from wasting all the water by a leaking flume or ditch, over and above what the findings show they have appropriated for beneficial uses.

We do not perceive that the court has required the plaintiffs to use a pipe in place of the flume or ditch. It has only

required that, whichever the means shall be that they employ to conduct the water, whether "flume or pipe, as plaintiffs may elect," they shall divert no more than the findings show that they have appropriated to a beneficial use, and that such use shall be at the times set out in the findings and decree. It would be no hardship on the plaintiffs to allow them to use a pipe in place of a flume which they had used; and it cannot be successfully contended, if the findings show that a ditch or flume owned by the plaintiffs, and for which they have the right of way, is in such condition that a large part of the waters of the stream is wasted on their lands before it reaches that of the lower riparian proprietor and subsequent appropriator, that then the court has not a right to order the prior appropriator so to conduct and use the water they have appropriated, either in a flume as originally carried, or a pipe, as they may elect, that the balance of the water shall not be wasted by leakage, and shall go down the stream to those having the right to it. To say otherwise would be to nullify the provisions of section 1411 of the Civil Code, which reads thus: "The appropriation must be for some useful or beneficial purpose, and, when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

The evidence was sufficient, as we think, to show that the court was justified in finding the extent of the plaintiffs' appropriation for beneficial uses; and that the defendants had acquired certain water rights for beneficial uses also subject to those acquired by plaintiffs. This being so, it was the province of a court of equity to secure each of the contending parties in the enjoyment of their rights acquired under the provisions of the law governing such a case: Frey v. Lowden, 70 Cal. 550, 11 Pac. 838. We conclude that the judgment is supported by the findings, and that the evidence is sufficient to support them.

It is further claimed as error that evidence was permitted, on the part of defendants, as to the effect upon their lands, as to value, by a deprivation of water, and that there was no other water supply for them. In this case it seems that the defendants had, upon the facts set up by them, claiming as appropriators, asked in their answer for an injunction against the plaintiffs to prevent them from taking water, to which the defendants made claim for the beneficial use of the same on

their lands. Unless the defendants could show that the waste of water by plaintiffs would be hurtful to their rights as subsequent appropriators, it might be that they could not get the relief they asked. So it would seem there was no prejudicial error committed in the ruling. Upon consideration of all the points made we perceive no prejudicial error, and advise that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GWIN v. SWEETSER et al.

No. 14,857; August 10, 1892.

30 Pac. 778.

Vendor and Vendee—Quantity of Land Conveyed.—Where a contract is made to sell a certain ranch, and the deed executed in pursuance thereof conveys all the land that the vendor has pointed out to the vendee as constituting the ranch, or has proposed to sell to him, and all that the vendee understood to be included in the agreement at the time it was executed, the vendee cannot afterward claim that an adjoining tract belonging to the vendor, and of which another person had possession under a contract of sale, should have been conveyed to him under the agreement as part of the ranch.

APPEAL from Superior Court, Solano County; A. J. Buckles, Judge.

Action by S. R. Gwin against A. I. Sweetser and others for specific performance. Judgment for defendants, and plaintiff appeals. Affirmed.

Horace Hawes for appellant; Geo. A. Lamont and J. M. Gregory for respondents.

VANCLIEF, C.—On February 11, 1888, a written agreement was executed between the plaintiff and defendants, whereby the defendants, among other things, agreed to convey to plaintiff, on or before March 15, 1888, a clear title to "the Andrew Sweetser ranch in Solano county, Cal., said

ranch being situated about one mile northwest of Cordelia, said ranch consisting of about eight hundred and twenty (820) acres, the same being the ranch on which the said Andrew Sweetser now resides." On February 28, 1888, the defendant Andrew I. Sweetser conveyed and delivered to plaintiff the ranch in Solano county on which he resided, consisting of 810 acres, and known as the "Andrew Sweetser Ranch." After residing upon that ranch about a year, the plaintiff claimed to discover, for the first time, that Sweetser had not conveyed to him all the land described in the agreement, but had intentionally omitted an adjoining tract of sixty-nine acres, which, he claims, was a part of the Andrew Sweetser ranch, at the dates of the agreement and the deed of conveyance. The object of this action is to enforce specific complete performance of the agreement on the part of the defendants by a decree of the court requiring Sweetser to convey to plaintiff the adjoining tract of sixty-nine acres. The trial was by the court and judgment passed for the defendants. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The principal ground upon which appellant asks a reversal of the judgment is that the evidence was insufficient to justify the findings of fact. Upon a careful reading of the evidence, which occupies seventy-three pages of the transcript, I think it so plainly and satisfactorily sufficient that no detailed statement of it here is necessary. Plaintiff's testimony shows that he examined the ranch, with the view of purchasing it, before the agreement was executed, when the boundaries thereof, as described in the deed, were shown him by Sweetser; and that the only reason he had for claiming the additional sixty-nine acres was that, upon examination of the county records, about a year after the execution of the deed, he discovered that the record title of the sixty-nine acres stood in the name of Andrew Sweetser, and hence he inferred that it must have been a part of the Andrew Sweetser ranch, named in the agreement, although it had not been pointed out to him as such by Sweetser before the execution of that agreement; and he admits that the deed executed to him by Sweetser describes all the land that Sweetser pointed out or proposed to sell, and all that plaintiff understood to be described in the agreement at the time it was executed.

Furthermore, the undisputed evidence on the part of the defendants shows that Sweetser contracted to sell the sixty-nine acres in dispute to one E. W. Hitchins in 1885, and then gave Hitchins possession of the land and a bond for a deed thereof on payment of the purchase money, on or before January 1, 1890, which bond was duly recorded in 1885; and that Hitchins resided upon, improved, and cultivated that tract continuously from 1885 until after February, 1888. It was also proved, and plaintiff admitted, that he had proposed to purchase that tract from Hitchins after the execution of the deed from Sweetser. Finally, the effect of the whole evidence is to prove clearly and satisfactorily that defendants fully performed their part of the written agreement according to its true meaning as understood and intended by both parties. There is nothing in appellant's objections to the admission of evidence offered by respondents requiring special consideration. I think the judgment and order should be affirmed.

We concur: Haynes, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

AUSTIN v. GAGAN et al.

No. 14,639; August 16, 1892.

30 Pac. 790.

Appeal—Presumption.—On Appeal from an Order Granting a New Trial, where the motion was made on several grounds, including insufficiency of the evidence, and it does not appear on what ground it was granted, it will be presumed, in support of the order, where there was a conflict of evidence on a material point, that it was granted because of insufficiency of the evidence, and the order will not be reversed.

Appeal.—An Order Granting a New Trial, when the evidence is conflicting, will not be reversed because the judge who made the order was not the one who presided at the trial.

APPEAL from Superior Court, Nevada County; John Caldwell, Judge.

Action by one Austin against one Gagan and others. From an order granting a new trial, defendants appeal. Affirmed.

F. T. Nilon and Chas. W. Kitts for appellants; Thos. S. Ford for respondent.

DE HAVEN, J.—The defendants appeal from an order of the superior court granting the plaintiff a new trial. The motion for a new trial was based upon alleged errors of law occurring during the trial, and upon the further ground that the evidence was insufficient to justify the decision of the court. The motion was heard upon a bill of exceptions, and the order of the court granting it does not specify the particular ground upon which the order was made.

1. Upon such a record the rule is firmly established here that the order will not be disturbed if the court was justified in granting the motion upon any of the grounds specified in the notice of motion for new trial: Weddle v. Stark, 10 Cal. 302; Oullahan v. Starbuck, 21 Cal. 414; Altschul v. Doyle, 48 Cal. 535; Pierce v. Schaden, 55 Cal. 407; People v. McAuslan, 43 Cal. 55. If there was a substantial conflict in the evidence, and the order is general in its terms, it will be presumed in support of the ruling of the court below that the order was based upon the ground of the insufficiency of the evidence, where that was one of the grounds of the motion. The action in this case was one in form to determine an adverse claim to real property, under section 738 of the Code of Civil Procedure, and the title of plaintiff is an entry of the land in controversy as a homestead under the laws of the United States. This entry or homestead filing was made on April 17, 1886, and it was a material question in the case whether at that date the land was known as "mineral land," within the meaning of the laws of the United States, and so not subject to entry as a homestead. The evidence upon this point was conflicting in a substantial degree, and this being so, we cannot disturb the order of the court setting aside its findings and granting a new trial.

2. Nor is the rule that this court will not reverse an order granting a new trial, where the evidence is conflicting,

changed by the fact, appearing in this case, that the judge who granted the motion was not the one who presided at the trial: Altschul v. Doyle, 48 Cal. 535; Wilson v. Railroad Co., 94 Cal. 166, 17 L. R. A. 685, 29 Pac. 861. It is unnecessary to pass upon the other questions discussed in the briefs of counsel.

Order affirmed.

We concur: McFarland, J.; Sharpstein, J.

SIRKUS v. CENTRAL R. CO.

No. 14,482; August 17, 1892.

30 Pac. 790.

Appeal—Record.—Where, on Appeal from a Refusal to Grant a motion for a new trial on the ground of newly discovered evidence, the record does not show the evidence given on the trial of the cause, so that it may be determined whether or not the newly discovered evidence is merely cumulative, it will be presumed that the lower court found that it was cumulative, and that the order refusing a new trial was correct.

APPEAL from Superior Court, City and County of San Francisco.

Action by Sirkus against the Central Railroad Company. From a refusal to grant a new trial, plaintiff appeals. Affirmed.

H. B. M. Miller for appellant; Frank Shay for respondent.

PER CURIAM.—After a verdict and judgment thereon in favor of the defendant in an action for damages resulting from personal injuries charged to have been caused by the negligence of the defendant, the plaintiff moved for a new trial upon the ground of newly discovered evidence, and in support thereof presented certain affidavits which he claimed would have produced a different result had the evidence

therein disclosed been before the jury. The court denied the motion, and the plaintiff has appealed. The record does not contain any of the evidence which was before the court or considered by the jury at the trial of the cause, and we are unable to determine whether or not the matter contained in the affidavits is cumulative, or whether it so overcomes that evidence that the court below would have been justified in granting a new trial. A motion for a new trial upon this ground is addressed very largely to the discretion of the trial court, and as it is always incumbent upon the appellant to show that error has been committed, so upon an appeal from this order it was the duty of the appellant to make it appear from the record that the court did not properly exercise its discretion: Byrne v. Reed, 75 Cal. 277, 17 Pac. 201. In the absence of any information respecting the former testimony, we must assume that the judge in passing upon the motion was of the opinion that the matter set forth in the affidavits was cumulative, and would not have changed the result. He was familiar with the testimony that had been given at the trial, and was able to compare the newly discovered evidence with that testimony, and his action must be assumed by us to have been correct.

The judgment and order are affirmed.

FREEMAN v. HENSLEY, Sheriff.

No. 14,741; August 17, 1892.

30 Pac. 792.

Sale—Change of Possession—Evidence.—In an action of claim and delivery against a sheriff for seven horses taken on attachment against plaintiff's vendor, it appeared that the sale to plaintiff was bona fide, and that there was an "immediate delivery." The evidence showed that soon after the delivery plaintiff employed a man who had been in the service of his vendor, and put him in charge of the horses; that with six of them in a team he and said vendor, with a like team, did a large amount of plowing for a third person; that while doing the plowing one of the horses of plaintiff's team was exchanged, for convenience in working, for one of the horses of his vendor's team.

Held, that the evidence supported the finding that there was an "actual and continued change of possession" following the sale of the property to plaintiff.

Sale—Change of Possession—Evidence.—In such case, evidence as to whom credit was given for the plowing done by plaintiff's team is immaterial, in the absence of an offer to show that the credit was given by his direction.

Sale—Change of Possession—Evidence.—In such case, a witness having testified in chief that he never heard the vendor, during a certain time, make any statement as to the ownership of the property, it was proper to ask him, on cross-examination, if the vendor did not, in a particular conversation during that time, tell him the horses belonged to plaintiff.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by John Freeman against John M. Hensley, as sheriff, to recover possession of personal property. From a judgment for plaintiff, defendant appeals. Affirmed.

Church & Cory for appellant; Van Meter & Warlow for respondent.

HAYNES, C.—This action, in claim and delivery, was brought by respondent to recover certain horses. The horses in question formerly belonged to one Porter, and were purchased from him by Freeman, October 12, 1889, and were afterward, on October 24, 1889, attached by defendant, as sheriff, as the property of Porter in an action brought by Patterson against Porter and Schell. It is conceded by appellant that there was no actual fraud in the sale of the horses by Porter to Freeman, but he contends that there was no immediate delivery of the property to Freeman, and that the sale was not followed by an actual and continued change of possession, as required by section 3440 of the Civil Code. The cause was tried by the court, and findings and judgment went for plaintiff; and, defendant's motion for a new trial having been denied, he appeals from the order denying it.

What constitutes an "immediate delivery" and an "actual and continued change of possession" is held to be a question of fact to be determined by the court upon the evidence presented in each particular case: Godchaux v. Mulford, 26

Cal. 322, 85 Am. Dec. 178; Claudius v. Aguirre, 89 Cal., at page 503, 26 Pac. 1078. In the latter case it was said: "The circumstances connected with a transfer of personal property are so varied that it would be impossible to frame a rule applicable to each case, or to determine in advance what acts would be sufficient to meet the requirements of the statute." The obvious correctness of this statement precludes any very material assistance either to the trial court or this court from adjudicated cases. There was no conflict in the testimony relied upon to show an immediate delivery of the property by Porter to Freeman. The bargain was made in the evening, the consideration being partly an indebtedness of Porter to Freeman, and the remainder was paid in cash by Freeman. The property consisted of seven horses, harness, and wagon. The next morning Porter took Freeman to the corral, and said to him, "There are your horses; there they are." Freeman and one Strimbeck, who was then boarding with him, took charge of the horses, fed and watered and harnessed them, and Porter executed a bill of sale of the property to Freeman. After this Porter informed Freeman that he had promised one Fletcher to furnish two teams, of six horses each, and a man to drive one of the teams, to do certain plowing for Fletcher, and that Fletcher was to pay $69 per month for the team and a man, and asked Freeman if he would let the team go to do that work. Freeman replied that he wanted the team to work, and that if he could get Strimbeck to drive it he would send the team. Freeman thereupon hired Strimbeck, at $30 per month, to drive the team, and put him in charge of it. Porter also got a man and took another team of six horses, and both teams went to Fletcher's. Fletcher not being ready to commence plowing, the teams were put in pasture at Fletcher's for some days, after which plowing commenced, when Strimbeck took charge of and drove Freeman's team. Some testimony on the part of appellant tended to show that, after plowing commenced, changes were made of horses from one team to the other, so that they became mixed, some of Porter's horses being in Strimbeck's team and some of Strimbeck's in Porter's. It was testified by respondent's witnesses that one of Strimbeck's horses was too slow for his mate, and one of the horses in the other team was too fast for his mate, and these two were changed for

the purpose of making them work better, and this change continued until Porter's team was attached, when they were changed back, and respondent's horses continued in Strimbeck's charge for some days, when they were also attached as the property of Porter. For some time after the two teams went to Fletcher's, he (Fletcher) did not know of any change of ownership, but later, and before the property in question was attached, respondent personally informed him of his ownership, and that Strimbeck was in his employ, and in response to a question as to whether the foreman might discharge Strimbeck respondent said, "No; when the man I put in charge don't suit, send stock and all in."

The principal conflict in the evidence as to the manner in which the teams were used at Fletcher's was in regard to changing horses from one team to another. There was no conflict in the evidence touching the employment of Strimbeck by respondent, nor that he was put in charge of respondent's horses, nor that Porter did not ask or receive any compensation from Fletcher for the services of Strimbeck or the team driven by him. Little weight should be attached to the fact that prior to this transaction Strimbeck had worked for Porter, and had driven horses owned by Porter and Schell, including the horses in controversy. He had, however, been out of Porter's employment for some weeks, and during that time was boarding with respondent. The team did not remain at Porter's, nor was Strimbeck under the control or direction of Porter, but was under the immediate control and direction of Mr. White, the foreman of Mr. Fletcher. I think there was nothing in the temporary change of horses from one team to another, for reasons which probably made each more effective, which should be held to destroy the continuity of the change of possession, especially where it is conceded that the sale was not fraudulent, and where the immediate delivery of the property to respondent was satisfactorily shown; for while it may be true that the burden of showing the actual and continued change of possession was on the plaintiff, and that showing such immediate delivery does not prove the continuance of the change of possession, it nevertheless reflects a light in which the after treatment of the property may properly be viewed by the court. The court did not err in sustaining plaintiff's objection to the ques-

tion put by defendant to his witness Fletcher, viz., "To whom did you give credit for the $69?" Obviously Fletcher's act could not affect the possession of Freeman or of Porter as a question of fact, nor be evidence of possession in the one or the other, unless made by their direction, and there was no offer to prove such direction. The question put to the witness White by plaintiff upon cross-examination was proper. The witness had testified in chief that he never heard Porter make any statement with regard to the ownership of the property while he was out there. The question on cross-examination called the witness' attention to a particular conversation, when it was asked if Porter did not tell him the team belonged to Freeman. After a careful examination of the evidence, I am of opinion that the court did not abuse its discretion in denying the motion for new trial; and advise that the order appealed from be affirmed.

We concur: Temple, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

NEWMAN et al. v. MALDONADO et al.

No. 14,786; August 26, 1892.

30 Pac. 833.

Appeal—Failure to Make Findings.—A judgment will not be reversed because of the failure of the trial court to find on issues the burden of proving which was on appellant, unless he shows by bill of exceptions or by statement that he offered evidence in support thereof, sufficient, in the absence of countervailing evidence, to justify a finding in his favor thereon.

Appeal—Waiver of Bond.—Under Code of Civil Procedure, section 940, requiring an undertaking to be filed or waived within five days after service of notice of appeal, the waiver must be made within the five days, but it need not be filed within that time. Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411, followed.

APPEAL from Superior Court, Los Angeles County; W. P. Wade, Judge.

Suit by Mary A. Newman, William Newman and others against George B. Maldonado, by Mary Hentig, his guardian ad litem, to quiet title to certain lands. From a judgment for plaintiffs, defendants appeal, and plaintiffs move to dismiss appeal. Motion to dismiss denied, and judgment affirmed.

George M. Holton, Duncan & Haas and Houghton, Silent & Campbell for appellants; Thomas J. Carran for respondents.

HAYNES, C.—Suit to quiet title to certain lands in Los Angeles county. The complaint is in the usual form. The defendant George B. Maldonado, a minor, appeared by his guardian ad litem, Mary Hentig, and filed an answer, and also a cross-complaint. The answer alleged that William Newman, one of the plaintiffs, was a minor, was not represented by guardian, and had no capacity to sue; denied the ownership of plaintiffs of the lands described in the complaint, or that they were, or ever had been, in possession, except as tenants of one J. H. Book, a special administrator of the estate of Bernard Newman, deceased, and of Mary Hentig, administratrix of said estate, and that as tenants they were holding over without right after the expiration of their term. The answer further admitted that he claimed to be the owner, and denied that his claim was without right, and alleged that defendant Mary Hentig claimed no interest otherwise than as his guardian. For a second and a third separate defense he pleaded that plaintiff's action was barred by sections 318 and 319, respectively, of the Code of Civil Procedure. Defendant's cross-complaint alleged his ownership of said lands as heir at law of Bernard Newman, deceased, under a decree of distribution made by the superior court June 30, 1888, in the matter of said estate; that plaintiffs claim as the heirs of John Newman, deceased; that John Newman's title rested upon an instrument purporting to be a conveyance made by said Bernard Newman to John Newman, January 22, 1874, and which was afterward re-

corded, but alleging that it was never delivered to John Newman, or to anyone for him, and that John Newman died without knowledge of the making or recording of it; that for a long time prior to the date of said conveyance, and up to the time of his death, November 15, 1886, Bernard Newman continued to occupy the premises adversely, and that since the death of Bernard Newman his administrators were in possession, paid the taxes, etc., until the final distribution of said estate, June 30, 1888, when said lands were distributed to defendant, and that he is still the owner, and seised in fee. The cross-complaint also repeated the allegations of the answer that plaintiffs entered under leases from Bernard Newman's administrators, and were holding over their term. The prayer of the cross-complaint was for a cancellation of the deed above mentioned, and that the title be quieted, etc. The plaintiffs joined in an answer to the cross-complaint, putting in issue all its material allegations. The transcript also contains another answer to the cross-complaint, which is as follows:

"Now comes W. B. Mathews, guardian ad litem, appointed by the court in the above-entitled action, and for answer to the cross-complaint herein denies each and every allegation therein severally.

"W. B. MATHEWS,
"Guardian ad Litem."

This answer was not verified. Findings and judgment went in favor of plaintiffs, and defendants appeal from the judgment upon the judgment-roll alone.

The findings are sufficient to support the judgment; but appellants contend that no findings were made upon several affirmative issues presented by defendant's answer, viz., the pleas of the statute of limitation; the allegation that plaintiffs entered under a lease and were in possession holding over after the expiration of their term; and that William Newman, one of the plaintiffs, was at the commencement of the action a minor, that he did not appear by guardian, and had not capacity to sue.

As to the first and second of these points it is sufficient to say that the burden of proving these affirmative matters rested upon the defendants, and, in the absence of evidence upon the issues thus presented, findings, if made, must have

been against them; and under that supposition the defendants were not prejudiced by the failure of the court to find upon them, and this court will not presume that evidence was introduced in support of such issues, where the record does not disclose that fact: Himmelman v. Henry, 84 Cal., at page 105, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 453, 26 Pac. 504. In Himmelman v. Henry, supra, the court said (page 106, 84 Cal., and page 1098, 23 Pac.): "This court will not reverse for the want of a finding upon an issue when there is no evidence in relation to that issue—meaning, of course, an issue upon a point not necessary to sustain the judgment, but only sufficient, if proved, to invalidate the judgment. . . . . The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it; but a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." Counsel for appellants cite several cases to the point that findings upon all these issues are necessary. In all of these cases except Roeding v. Perasso, 62 Cal. 515, the appeal was from an order granting or refusing a new trial, as well as from the judgment; and it may therefore be inferred that the evidence touching the issues not found was before this court. In the excepted case above mentioned the opinion is per curiam, consisting of but five lines. There the appeal was from the decree rendered in the court below, and from an order refusing to modify it; but whether there was a bill of exceptions or whether the fact that evidence was or was not given upon the issues in question, is not disclosed by the case as reported and does not appear. These cases, therefore, cannot be held to conflict with the cases sustaining the proposition that to enable defendant Maldonado to reverse a judgment against him, upon the ground that no findings were made upon material issues raised by the averment of new matter in the answer, he must show by bill of exceptions or statement that he offered evidence in support of his allegation sufficient, in the absence of countervailing evidence, to justify a finding in his favor upon such issue.

Appellants' contention that there was no finding upon the allegation contained in the answer of the incapacity of one of the plaintiffs, William Newman, and that for that reason the judgment should be reversed, would be disposed of by the foregoing but for the insertion in the record of what purports to be an answer of W. B. Mathews, guardian ad litem, but which, among other imperfections, does not disclose for whom he was appointed such guardian, nor for whom he answered. The objection that this plaintiff was a minor, not appearing upon the face of the complaint, was properly taken by answer; but, like all other defenses of new matter, it is deemed denied, and the burden of proof was therefore upon the defendants, and, in the absence of evidence, the finding, if one were made, must have been against them. Counsel for respondents contends that, as the allegation of infancy was made only as to William Newman, the answer referred to must be presumed to have been that of William Newman. If that presumption may be indulged for any purpose, it must be taken as a confession that he was an infant, as alleged by defendant Maldonado, and if so, a finding that he was an infant might have been made. That, however, would not have aided the appellants so far as the want of a finding upon that point is concerned, since, if it can be considered at all, it must be taken as an admission upon the pleadings, which rendered a finding unnecessary (Swift v. Muygridge, 8 Cal. 445); and in that case appellants would have the full benefit of a finding in their favor by such admission. But I do not think this answer, which does not disclose for whom he was appointed such guardian, and which therefore could not give him authority to bind anyone, can be considered for any purpose; and a finding upon that issue must therefore be held unnecessary upon the authorities and for the reasons hereinbefore stated in reference to the other issues upon which no findings were made. If we were to regard the answer in question as an answer to the cross-complaint, it would not aid appellants, as there was a finding that all the allegations of the cross-complaint were untrue.

Whether the judgment in favor of William Newman be or be not conclusive between the parties is neither considered nor decided. It is sufficient to say that the record dis-

closes no ground upon which, under the authorities heretofore cited, a reversal can be properly based.

Respondent's counsel makes the point in his brief that the appeal in this case should be dismissed, upon the ground that the written waiver of an undertaking on appeal was not filed until the sixth day after the notice of appeal was served. Respondents moved this court to dismiss the appeal upon other grounds, before the submission of the cause on the merits. Good practice would have required the ground now urged for a dismissal to have been presented at that time. The notice of appeal was served February 1, 1890, and the waiver of an undertaking on appeal was filed February 7th. The waiver was not dated, nor is it claimed by counsel for respondents that it was not made before the time expired for filing an undertaking on appeal. Section 940 of the Code of Civil Procedure does not require the waiver to be filed within the five days limited for filing an undertaking on appeal, if it is required to be filed at all. The waiver must be made before the time for filing the undertaking expires (Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411); but there is no intimation in that case, or in any other to which counsel has referred, sustaining his proposition that the stipulation must be filed within that time. I find no case in which this question was directly presented or decided, but the intimations and reasoning of the court in several cases would seem to sustain the construction above given: See Buffendeau v. Edmondson, 24 Cal. 95; Moyle v. Landers, 78 Cal., at page 106, 12 Am. St. Rep. 22, 20 Pac. 241, and Little v. Jacks, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, and 11 Pac. 128. I think respondents' request to dismiss the appeal must be denied, and that the judgment appealed from should be affirmed, and so advise.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

ODD FELLOWS' SAVINGS BANK v. TURMAN.

No. 14,487; August 30, 1892.

30 Pac. 966.

Trespass—Title to Maintain.—Certified Transcripts of several recorded deeds, the first purporting to convey "a portion" of certain land, but not designating any particular portion, the second a "further portion," and the third the "remaining portion," offered without any showing of title in the grantors or that the grantee had entered claiming under the said deeds, are not sufficient evidence of title to enable the grantee to maintain an action for trespass on the land.

Trespass—Possession.—Evidence of the survey of land, made for the purpose of locating a certain lake, an advertisement of the land for sale or rent, and a notification to a certain stockman to keep his stock off of "that land," is not sufficient, as to actual possession, to enable the alleged owner to maintain an action for trespass on the land.[1]

Trespass — Defense — Estoppel.— The fact that defendant, in an action for trespass on land, makes the defense that the land was not fenced, does not estop him afterward from denying plaintiff's ownership of the land.

APPEAL from Superior Court, Colusa County; E. A. Bridgford, Judge.

Trespass by the Odd Fellows' Savings Bank against H. B. Turman. Judgment for defendant. Plaintiff appeals. Affirmed.

Clark & Aram for appellant; H. M. Albery for respondent.

McFARLAND, J.—This is an appeal by plaintiff from a judgment in favor of defendant and from an order denying a new trial. In the complaint (which was not verified) it is averred that plaintiff is, and during a certain named period was, "the owner of and lawfully in possession of" a large body of land described by legal subdivisions; and

[1] **Cited** in Rogers v. Duhart, 97 Cal. 506, 32 Pac. 571, and distinguished from a case where the plaintiff, in trespass, has good title as lessee.

that during the said named period defendant's cattle pastured on said land, and destroyed grass, hay, etc., to plaintiff's damage in the sum of $3,000. In the answer "each and every allegation" of the complaint is denied. The court found that plaintiff was not either the owner or in possession of any part of the land described in the complaint at any time mentioned therein, and the evidence clearly warrants said finding. To prove paper title, plaintiff introduced a properly certified transcript of a recorded deed from one Maurice Dore to plaintiff, which purported to convey "a portion" of the land described in the complaint—what portion does not appear. There was then introduced a defective certificate of another recorded deed from said Dore to plaintiff of a "further portion" of said lands, and another defective certificate of a recorded deed to plaintiff from one Fisher of the "remaining portion" thereof. This was all the evidence offered on that subject. There was no evidence tending to show that either said Dore or Fisher ever had title, or any estate or interest whatever, in any part of said land. There was no attempt to trace the title to its paramount source, and therefore no title was shown. There was no evidence that plaintiff entered upon said land, or any part of it, claiming under either of said deeds, and therefore there was no color of title shown.

There was no evidence showing that plaintiff was ever in the actual possession of the land or of any part of it. It is mostly tule land, unfenced and uninclosed. An agent of plaintiff visited the land once, and had some surveying done for the purpose of locating a certain Coon lake; and he also at one time advertised it for sale or rent, but had no offers. He also notified defendant's agent once to keep his cattle off "that land." These were the only acts done in the premises, and, of course, they did not constitute actual possession.

Appellant contends that there is some evidence of plaintiff's title to some parts of the land in certain answers of its witness Hiatt, given on cross-examination, in which he says, without objection, that "the bank owns" certain mentioned small tracts. But these answers were in response to questions in cross-examination, evidently, not with reference to the subject of title or ownership, but for the pur-

pose of locating the lands claimed by appellant, and distinguishing them from lands claimed by Mr. Parks, and it was clearly so understood by both the questioner and the witness. Hiatt had testified in chief about the lands "described in the complaint," but he did not say or pretend to know anything about the title. At the end of his cross-examination he said: "I am only answering from the map; that is the only way I can answer it." The form of the answers, therefore, cannot be taken as evidence—certainly not as sufficient evidence—to establish title or ownership. The correct finding that appellant had no ownership or possession of the land renders it unnecessary to examine the somewhat complicated question as to what fence law obtains in Sutter county. The point that, because respondent made the separate defense that the lands described in the complaint were not fenced, he is estopped from denying that appellant owned them, is obviously too untenable to need discussion. Judgment and order affirmed.

We concur: De Haven, J.; Sharpstein, J.

MILLAN v. HOOD.

No. 14,756; September 1, 1892.

30 Pac. 1107.

New Trial—Statement.—Code of Civil Procedure, section 659, subdivision 3, provides that, if a notice of motion for a new trial designates that the motion will be made upon a statement of the case, on the grounds of insufficient evidence and errors of law, the statement must specify wherein the evidence is insufficient, and the particular errors relied upon, otherwise it must be disregarded on the hearing of the motion. Held, that if the statement on which such a motion was made does not make the specification required, the motion should be denied.

Pleading.—The Overruling of a Demurrer to a Cross-complaint, which makes the issue identical with that raised by the original pleadings, does not prejudice the party demurring.

APPEAL from Superior Court, Placer County; B. F. Myres, Judge.

Action by W. G. Millan against Christopher Hood to enforce a trust in land. Judgment for defendant. Plaintiff appeals. Affirmed.

John M. Fulweiler and Ben. P. Tabor for appellant; A. L. Hart and F. P. Tuttle for respondent.

VANCLIEF, C.—Action to enforce an alleged trust in land. Judgment for defendant, from which and from an order denying his motion for a new trial the plaintiff appeals.

1. The notice of intention to move for a new trial stated, as the grounds upon which the motion would be made, only insufficiency of the evidence to justify the findings and errors in law committed at the trial. It further stated that the motion would be made "upon a statement of the case." But the statement of the case, which was thereafter made and allowed by the court, contains no specifications of any particular in which the evidence is insufficient to justify the findings nor of any error in law committed by the court. Therefore, in obedience to section 659 of the Code of Civil Procedure, the trial court must have disregarded the statement, and consequently did not err in denying the motion for a new trial.

2. The plaintiff demurred to the following addition to the answer of defendant, on the ground that the same does not state facts sufficient to constitute a cause of action against the plaintiff: "And further answering, and for a cross-complaint, the defendant avers: (1) That he now is, and for a long time prior to the commencement of this action he was, the owner, in the possession and entitled to the possession of all that certain real estate described in the complaint, and particularly described as follows, to wit: The east half of the southwest quarter, and the southeast quarter of the northwest quarter, of section 13, in township 14 north, range 9 east, Mount Diablo base and meridian; (2) that the plaintiff herein claims some interest in said property adverse to the said defendant, but that said claim of plaintiff is without any right whatever, and that the said plaintiff has not any estate, right, title or interest whatever in said land or premises, or any part thereof." The court overruled the demurrer, and thereupon plaintiff's counsel, who was present in court at the

time, asked the court to allow him twenty days' time in which to answer the so-called cross-complaint, and the court granted his request, but, plaintiff having failed to answer within twenty days, the clerk entered his default. Thereupon the plaintiff moved the court to open the default, and for leave to answer the alleged cross-complaint, on the grounds that the default "was improperly entered, and, if properly entered, was the result of mistake, inadvertence, and excusable neglect." The motion was presented and heard on affidavits, and the proffered answer to the cross-complaint. The court denied the motion and plaintiff excepted. This motion, with the affidavits, proposed answer, minutes of the court, and other facts upon which it was heard, are made to appear by a bill of exceptions, settled and allowed before the trial, which may be considered on the appeal from the judgment. It is contended by counsel for appellant that the court erred in overruling the plaintiff's demurrer to the so-called cross-complaint, and also in denying plaintiff's motion to open the default and to allow the plaintiff to file his proposed answer.

So far as the averments in the alleged cross-complaint are material, they are mere repetitious facts alleged in the answer or in the complaint. They tendered no issue not made or tendered by the answer. They might have been stricken out without necessitating any change in the trial of the case. All the averments of the so-called cross-complaint were redundant, superfluous, and, upon motion, should and probably would have been stricken out (Code Civ. Proc., sec. 453; Mora v. Le Roy, 58 Cal. 8); yet the plaintiff could not have been injured by them, since, so far as they were not mere repetitions of material parts of the answer which constituted a valid defense, they affirmed only that plaintiff claimed the property in question adversely to defendant, which he expressly admitted in his proffered answer to the alleged cross-complaint, and which is in perfect accord with his complaint, and there is in his said proffered answer no denial of any averment of the alleged cross-complaint, except the averment that defendant is the owner of the property in controversy, and the issue made by this denial is identical with an issue raised by the pleadings independently of the alleged cross-complaint. Were it deemed necessary, the action of the court probably might be justified on other grounds, furnished by

the bill of exceptions; but, conceding that the court erred, it is sufficiently apparent that plaintiff's cause could not have been prejudiced thereby. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

BARRETT v. AUSTIN.

No. 14,753; September 1, 1892.

31 Pac. 3.

Contract to Bore Well—Abandonment of Work.—In an action on a contract for boring a well on plaintiff's land it appeared that he agreed to furnish the casing, fuel, and board for defendant and his men "at his own expense," and pay a certain sum when the well was completed. Defendant agreed to continue boring the well, "barring bad weather or other unavoidable hindrances," till a certain depth was reached or impenetrable rock was encountered. When about half the agreed depth was reached, defendant's auger broke near the lower end, and became fastened in the well. Defendant claimed he could remove the broken piece, and, after striving unsuccessfully for three weeks, plaintiff refused to furnish further fuel and board, and defendant abandoned the work. Held, that plaintiff was not entitled to recover for the value of supplies furnished defendant to the date the work was abandoned, since by the contract he was not released from furnishing them while boring was prevented by "unavoidable hindrances."

Contract to Bore Well—Abandonment of Work.—In such action defendant is not entitled to recover on a cross-complaint for the number of feet bored, at the contract price, since he was not prevented by plaintiff, nor by encountering impenetrable rock, from performing his contract.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by B. H. Barrett against O. A. Austin on a contract for boring a well. From a judgment for plaintiff, defendant appeals. Reversed.

R. B. Terry and Geo. B. Graham for appellant; Church & Cory for respondent.

BELCHER, C.—This is an action to recover damages for breach of contract. It is alleged in the complaint that on the fourth day of February, 1890, plaintiff and defendant entered into a written contract, a copy of which is set out, for the boring of a well on plaintiff's land; that plaintiff complied with all the conditions of the contract to be performed on his part, and in pursuance thereof furnished the materials and supplies provided for of the value of $1,000; and the defendant failed and refused to comply with any of the conditions to be performed on his part, and that, by reason of such failure and refusal, plaintiff had been damaged in the sum of $1,000, for which he asked judgment. By the contract the plaintiff bound himself "to furnish all the tubing and casing at his own expense; also all necessary fuel for the use of the engine, and all the casing clay needed in the boring of a certain well, now commenced and sunk about one hundred and forty feet, on the following described land," etc.; "also to board and furnish house room for the men—three in number—employed in boring said well"; "also to pay to the party of the second part (defendant) seventy cents per foot in depth, commencing from the top of the ground, for each and every foot in depth of said well, and to make said payment in full, as aforesaid, at the completion and cessation of the boring of said well." And the defendant bound himself "to continue the boring of said well, commencing on the eleventh day of February instant, barring bad weather or other unavoidable hindrances, until the depth of one thousand feet shall have been secured," provided that if a satisfactory flow of water should be secured, or impenetrable rock be encountered, before the depth of one thousand feet should be reached, then the boring was to cease, and the defendant was to be paid for the work done, as before provided. By his answer, the defendant admitted the execution of the contract, but denied that plaintiff had complied with all the

conditions thereof as alleged; and also denied that he had sustained damages in the sum of $1,000, or in any sum, by reason of any failure, neglect, or refusal on the part of defendant to perform the conditions of the contract to be by him performed; and alleged that plaintiff was the party in default, and by his own acts had prevented the completion of the work. Defendant also filed a cross-complaint, in which he set up the contract, and alleged that under and in pursuance of its terms he commenced boring the well on the eleventh day of February, 1890; that he had at the place of performance all necessary machinery and assistance for the full execution and completion thereof; that he steadily and industriously continued the work until the ninth day of April, 1890, when the plaintiff failed and refused to furnish any more fuel for the engine or board for the men; and that by reason of such failure and refusal he was then, and ever since had been, prevented from proceeding and fully completing the work required of him by the terms of the contract, although he was, and at all times since had been, ready, willing and able to perform all the conditions required to be kept and performed by him; that, in accordance with the terms of the contract, he bored the well to a depth of five hundred and sixty-three feet, and at the request of plaintiff furnished and used therein thirty-four feet of casing of the value of $15.30, and loaned to the plaintiff $2.50; that there was due to defendant from plaintiff, for the boring done, the casing furnished, and the money loaned, the sum of $411.90, for which he prayed judgment. At the trial it was proved, without contradiction, that the defendant commenced boring the well on the 11th of February, and continued the work a little more than a month, when his boring pipe and auger broke near the lower end thereof. He then tried to remove the broken pieces, and to that end worked diligently until the 9th of April. Up to that time the plaintiff furnished fuel for the engine and board for the men, but he then refused to furnish them any longer. The plaintiff testified: "The boring was stopped by reason of his boring pipe breaking off and leaving the auger at the bottom of the well. Defendant worked about two or three weeks trying to get the auger out, ... but he never succeeded in getting it out, and finally I quit, because I never agreed to dig his tools out, if

he got them fast. I quit furnishing him provisions after he got the auger stuck in the well, I think about two or three weeks. . . . . I saw no way to get the auger and boring pipe out of the well. Mr. Austin says he can get it out. He always contended that he would get it out. Said he could bore the well. . . . . I didn't propose to keep furnishing him with fuel and provisions to dig out his tools. I didn't consider that I had agreed to do that. After he got them down there he could not get them out, and I quit. He told me that he could get the tools out and complete the well."

When the plaintiff refused to furnish any more fuel or provisions, defendant notified him that, unless they were furnished, he would be compelled to stop all further work. He testified: "I remained there and worked all the time steadily at the work until the time he quit furnishing me and refused to furnish me the supplies that is required of him by the contract. I was compelled to quit for want of these supplies." When the work was stopped defendant had bored the well to a depth of five hundred and sixty-three feet, and had used four hundred and thirty-eight feet of the casing furnished by plaintiff, the cost price of which was seventy-five cents a foot. The court found that the plaintiff had complied with all the conditions of the contract to be performed on his part, and that he caused to be delivered at the proper place casing of the value of $400, and furnished board and lodging to the defendant of the value of $30, and wood of the value of $150; that defendant failed, neglected, and refused to comply with the conditions of the contract to be performed on his part, and abandoned the contract before the commencement of the action; and, as a conclusion of law, that the plaintiff was entitled to judgment against the defendant for the sum of $580, damages for breach of the contract and costs. Judgment was accordingly so entered, from which, and from an order denying a new trial, defendant appeals.

1. It is apparent that the judgment as entered was erroneous. It allowed the plaintiff $400 for the casing delivered, when, at most, he was entitled only to recover for so much as was used, the cost of which was $328.50. Besides, the casing is still in his land, and belongs to him, and it may perhaps be taken out, and then have some value over the cost of its recovery. The judgment also ignores the defendant's

claim for the casing furnished and the money paid out by him.

2. If the judgment might be modified so as to correct the errors above noted, still we are unable to see how, under the facts shown, the plaintiff was entitled to any relief. By the contract he obligated himself to furnish the casing, fuel, and board "at his own expense," and the defendant obligated himself to commence and continue the boring, "barring bad weather or other unavoidable hindrances." There was no provision that the plaintiff should be released from furnishing the supplies during the continuance of bad weather or other hindrances, and that he did not understand that he was so released is shown by the fact that he continued to furnish them for about three weeks after the auger was broken. It is difficult to define the words "unavoidable hindrances," but we think they must have been intended to include accidents such as occurred here. It is a matter of common knowledge that tools and machinery often unexpectedly break, and that augers used in boring wells frequently break in the ground, without any carelessness or fault on the part of the parties using them. The plaintiff, therefore, was not justified in refusing to furnish any more supplies, because he thought the broken pieces could never be removed, when the defendant, an experienced well-borer, was trying diligently to remove them, and insisting that he could and would remove them, and complete the boring of the well. It is true that it might have been a hardship on plaintiff to be compelled to continue furnishing the supplies for an indefinite time, but the hardship on defendant would have been equally great or greater, as he had to employ three men and keep and use costly machinery during the period of delay. It was, of course, an unfortunate accident, but, in the absence of a stipulation to the contrary, each party must bear his share of the loss. The covenants were mutual, and, when the plaintiff refused to furnish any more supplies, the defendant was justified, if he chose to do so, in stopping the work, but his stopping did not give the plaintiff any cause of action for damages.

The defendant claimed in the court below, and claims here, that he was entitled to have judgment entered in his favor, according to the prayer of his cross-complaint. We do not agree with him in this. By the terms of the contract he was

only to be paid when he had bored the well to a depth of a thousand feet, or had found a sufficient supply of water, or had met with impenetrable rock. Now, while he may have been justified in stopping the work as he did, still he was not prevented by the acts of the plaintiff from going on and performing the contract on his part: Cox v. McLaughlin, 52 Cal. 590, and 54 Cal. 605. He might have furnished the necessary supplies himself, and doubtless when the well was sunk to the required depth could have maintained an action to recover their value. Our conclusion is that when the action was commenced the plaintiff had no cause of action against the defendant for the materials furnished, and the defendant none against the plaintiff for the work then done. We therefore advise that the judgment and order be reversed and the cause remanded.

We concur: Foote, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded.

JANES v. DE AZEVEDO et al.

No. 14,875; September 8, 1892.

30 Pac. 1104.

Appeal—Review—Statute of Limitations.—A finding by the court that the cause of action was barred by the statute of limitations will not be disturbed on appeal where the evidence is not brought up, and nothing appears in the record to the contrary.

APPEAL from Superior Court, Marin County; E. B. Mahon, Judge.

Action by Louis L. Janes against Joaquin P. De Azevedo and others for the legal title to some land. From a judgment in favor of defendants, plaintiff appeals on the judgment-roll alone. Affirmed.

A. L. Rhodes for appellant; E. M. Wilson, Craig & Meredith and S. L. Rogers for respondents.

McFARLAND, J.—This action was brought against a large number of defendants to compel each of them to convey to plaintiff the legal title to the undivided one-fifth of the part of a certain tract of land which each defendant claims to hold. Judgment was rendered for the defendant, and plaintiff appeals from the judgment upon the judgment-roll alone, there being no bill of exceptions or statement. The answer of the defendants sets up several valid defenses; the findings of the court fully support those defenses; the conclusion of law is that the plaintiff should take nothing by his complaint, and that defendants should be dismissed with their costs; and the conclusion of law is amply warranted by the findings of fact. Moreover, the answer avers that the alleged causes of action stated in the complaint are barred by the provisions of several named sections of the Code of Civil Procedure, between sections 318 and 343; and the court finds that they were barred by the sections named. And as there is no evidence before us, and nothing in the record inconsistent with the finding as to the statute of limitations, this finding is itself conclusive of the case against appellant. We do not deem it necessary to state here the facts of this case, which extend over a period of more than thirty years. Counsel for appellant seems to contend only for these two propositions: First, that the grantee of the legal title from one who held it subject to some trust can never, under any circumstances, hold it adversely to the beneficiary; and, second, that although a beneficiary has fully settled with the trustee, and has completely and finally released and discharged him from all the obligations of the trust, such discharge cannot inure to the benefit of a bona fide purchaser of the title from the trustee. Neither of these propositions can be maintained. Appellant does not point out any specific error committed by the trial court, and we see no reason, either in law or equity, for disturbing the judgment.

The judgment is affirmed.

We concur: De Haven, J.; Sharpstein, J.

BEAN v. PROSEUS.

No. 14,884; September 12, 1892.

31 Pac. 49.

Negotiable Instruments—Consideration.—In an Action on a Note for $625, the evidence was undisputed that, in consideration for the note, plaintiff transferred to defendant a one-half interest in a note for $2,500, on which the maker thereof agreed to pay $1,250 as a compromise. Held, that the fact that afterward, in an action thereon, the latter note was declared to have been made without consideration, does not affect the consideration for the note in suit, and plaintiff should recover.

APPEAL from Superior Court, Sierra County; John Caldwell, Judge.

Action on a promissory note by Philander C. Bean against one Proseus. Defendant had judgment and plaintiff appeals. Reversed.

Frank R. Wehe for appellant; John Gale and S. B. Davidson for respondents.

PATERSON, J.—In January, 1885, the appellant held a note against his brother, Joel Bean, for the sum of $2,500. The circumstances under which the note was given are fully set forth in Bell v. Bean, 75 Cal. 86, 16 Pac. 521, where it was held that the note was without consideration. The defendant was to receive one-half of the amount collected, as payment for professional services rendered the plaintiff. On April 21, 1885, the defendant transferred the note to Bell & Co. as security for the payment of the sum of $500, which he owed them. Joel Bean several times offered to pay $1,250; but the defendant, acting for himself and plaintiff, refused to accept less than $2,500. The appellant, being unwilling to engage in litigation with his brother, sold his interest in the note to the defendant, and received from the latter, as payment therefor, a promissory note for $625. Defendant refused to pay the note, claiming that it was given without any consideration, whereupon this action was brought to recover

the amount of the principal and interest due on the note. The court found that the note was executed and delivered by defendant without consideration, and judgment was entered against the plaintiff for costs of the suit. From this judgment, and from the order denying his motion for a new trial, plaintiff has appealed.

The respondent claims that the finding of the court is sustained by the admitted fact that there was no consideration for the $2,500 note. There being no consideration for that note, the $625 note given in payment of plaintiff's interest therein is necessarily without consideration. This contention cannot be sustained. The learned judge of the court below overlooked the fact, which is undisputed, that, at the time this note was given by the defendant to the plaintiff, Joel Bean was willing to pay in satisfaction of the claim made against him the sum of $1,250. The $2,500 note, therefore, had an actual cash value of $1,250 when appellant transferred his interest therein to defendant. How can it be said, therefore, that plaintiff parted with nothing of value? It was not his fault that defendant afterward failed to recover on the note. The latter preferred to litigate. He took the chance of getting more than the amount offered in compromise, and lost. Plaintiff parted with his right to compromise, relying upon defendant's promise to pay him the $625, and is entitled to recover. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: Garoutte, J.; McFarland, J.

ROGERS v. ROGERS.

No. 14,870; September 13, 1892.

31 Pac. 157.

Divorce—Increasing Allowance for Child.—Plaintiff, by a decree of divorce in 1885, obtained the custody of the child, with a monthly allowance of $5 from defendant for its support. In 1891, plaintiff applied to the court for an increased allowance, and made affidavit that $30 per month was required, and that defendant's in-

come was $250 per month; all of which defendant denied by his affidavit. Held, that an allowance by the court of $20 per month was not excessive.

Divorce — Allowance — Scandalous Affidavit.—Where, in such case, defendant's affidavit contained impertinent and scandalous matter reflecting on the character of plaintiff, such matter was properly stricken out.

APPEAL from Superior Court, Marin County; F. M. Angelotti, Judge.

Application by Mary E. Rogers for an increased monthly allowance from S. L. Rogers, her divorced husband, for the support of their child. From an order granting the application, defendant appeals. Affirmed.

The following is the portion of the affidavit referred to in the opinion: "Affiant says that plaintiff is not a suitable or proper person to have the care, custody, or control of said child Herbert, or any other child, for the following reasons and others: That when affiant married said plaintiff, he supposed she was a single woman of good moral character, but that after a period of about one year affiant learned that plaintiff had, for nearly two years next prior thereto to said marriage, constantly been associating and running around and about San Francisco with a gay, fast man by the name of Dr. Moreno. That plaintiff even went to the cabin, house, domicile, or quasi residence of said Moreno, and there remained under the same roof, in the same house or cabin, with said Moreno, for a long time, Moreno's wife then not being there. That said Moreno at one time stayed at the rooms or residence of an unmarried Spanish woman at Sacramento, by the alias name of 'Corina,' a woman of unchaste reputation. That affiant married plaintiff in 1871, and on or about the ninth day of December, 1871, plaintiff then being enceinte, she, by the use of a steel instrument called 'catheter' (which affiant now has in his possession), used the same upon her person in such a manner as to produce a miscarriage or an abortion, whereby plaintiff was delivered of two stillborn male infants, which were thereafter buried in the garden of affiant's then residence at Sacramento, whereby affiant was put to very great expense on account thereof, to wit, several hundred dollars. That on the twenty-seventh day of May,

1872, while affiant was attending court at Woodland, plaintiff, without the knowledge or consent of affiant, went to the store of Hamburger & Co., in said Sacramento, and, by false and deceptive statements, bought and had charged to this affiant dry-goods to the amount of over $218, mostly for silk dress patterns, then took from affiant's house all the silverware, table linen, a large amount of sheets, pillowcases, towels, napkins, bedclothes, knives, forks, spoons, etc., and many other things (all of which belonged to affiant long before affiant ever saw or was married to plaintiff), and said plaintiff 'ran away,' and left for San Francisco, and there got credit on account of the said firm of said Hamburger & Co., and to their indebtedness, which shameful and disgraceful transaction cost affiant to settle said bills, get plaintiff home, and attempt to keep the said 'runaway' out of and from the public and press, more than $1,000. That plaintiff on the —— day of ————, 1872, she then being again enceinte, by the use of said catheter, again used the same upon her person so as to produce another abortion or miscarriage, whereby she was again delivered of a stillborn male infant, which said infant was buried in said garden, beside those aforesaid, whereby affiant was again put to great costs, trouble, and expense thereby, to wit, several hundred dollars. That on the —— day of ————, 1873, plaintiff asked affiant for $30, as she said, to buy jewelry for her mother. Affiant refused to give it, when plaintiff immediately took a gold watch and chain of hers (a gift from affiant), and went to the pawnshop of one Stineman, on Second street, in said Sacramento, and there pawned said watch and chain and got $30 from said Stineman, which said sum affiant, to save his shame and mortification, paid to said Stineman to keep said transaction from becoming publicly known. That by reason of plaintiff's disgraceful conduct and transactions at Sacramento and Davisville, affiant was greatly mortified, disgraced, and for a long time they were the scandal of society, whereby affiant was irreparably injured in his position in the community, at the bar, and everywhere wherein his business relations or acquaintance extended, and especially in his profession, he having, before that time, been counsel for many of the largest firms in Sacramento, to wit, D. O. Mills & Co., Baker & Hamilton, Adams McNeal, N. L. Drew & Co., besides many others.

nearly all of whom greatly disapproved and severely censured affiant for ever living with, or having anything to do with, plaintiff after her said 'runaway.' That by reason of affiant's mortification, disgrace, and chagrin, caused as aforesaid by the acts of plaintiff, it was impossible for affiant to remain longer in said Sacramento, where he had a large and profitable practice, and he thereby gave up and sacrificed his business and came to Sausalito, plaintiff in the meantime pledging herself in the future to thus conduct herself different. That at Sausalito affiant built a comfortable residence for his family, was free from debt, had other property, and some money besides. That plaintiff, disregarding her said promise and duties as a wife and mother to her child, did on or about the twenty-fifth day of June, 1882, when she then expected in a few days to be confined and mother to another child, tell affiant with her own lips that the child then soon expected to be born,—these words, 'It is a matter in which you have no interest.' The effect of these words from the lips of plaintiff to affiant was such as may better be imagined than described. That on the twenty-sixth day of July, 1882, when plaintiff was about to be confined, she took a large quantity of ether or chloroform, with the intention, as affiant has reason to believe and does believe, she took the same for the express purpose of getting rid of her child. That she remained in a stupefied condition therefrom until July 28, 1882, at about 2 o'clock A. M., when she, her nurse, and the physician, who had been present for more than thirty hours, believed the said child then to be dead, and that unusual means must speedily be taken to try to save the life of plaintiff. That affiant, at that hour of the night, rode from Sausalito to San Rafael in the most hasty method, to procure another physician for consultation and assistance. That affiant thereby, by reason of plaintiff's taking said chloroform, was put to very heavy expense and trouble to save the life of plaintiff, and fortunately the child, who is now called 'Herbert,' plaintiff's sixth child, the subject of this controversy. That on the sixteenth day of July, 1883, while affiant was attending court at Suisun, plaintiff, unknown to affiant, gathered all the silverware, table linen, most of the blankets, sheets, much of the bedding, a lot of chinaware, and other household effects too numerous to mention, and, taking affi-

ant's two children, again 'ran away,' leaving affiant's house, and the next day served papers upon affiant for a divorce, and which said papers are now on file in this court, and are a lasting disgrace and forever a stain to the name of her children. That thereby affiant was put to a large expense, to wit, hundreds and hundreds of dollars, for counsel fees, costs, alimony, for plaintiff's numerous attorneys, and trouble, causing affiant to borrow money and thereby become largely in debt. And thereafter plaintiff returned to affiant's home, but she was wholly ignored by most of the people in society and among acquaintances, whereby affiant and his children were greatly scandalized in said society. That thereafter, on the twelfth day of February, 1885, while affiant was away to court at Oakland, plaintiff, unknown to affiant, gathered all the silverware, all the bedclothes (except one blanket and one sheet) in the house, most of the crockery, linen, towels, napkins, curtains, knives, forks, spoons, etc., and, taking affiant's two children, 'ran away,' leaving all the doors, inside and outside, to affiant's house wide open, so any person could enter at liberty, and at the same time there was stolen from affiant's house the sum of $180, which belonged to parties for whom affiant had collected the same, which said sum affiant had to repay to said parties. That thereafter plaintiff commenced another suit for divorce against affiant, similar to the first, but affiant made no opposition whatsoever on the trial thereof, but allowed plaintiff, her mother and sister to swear to anything and everything they wished, true and false, to procure a decree, whereby affiant might be freed and rid of her. That by the said decree plaintiff was awarded much more than one-half of affiant's property, notwithstanding none of said property was common or community property, affiant having (as plaintiff had not a decent garment to be married in) found the money for plaintiff to buy the dress and clothes plaintiff wore when they were unfortunately married, and the gold watch and chain she wears. Affiant further says that the disgraceful conduct of plaintiff since his said marriage with her has cost him more than $8,000, and affiant now has no home of his own, or but very little property left. Wherefore affiant asks this court, in justice to the future welfare of affiant's child, who is dear to him, and whom affiant wishes yet to bring up in a moral and respectable

manner, that he may not become a hoodlum upon the streets of San Francisco, and a disgrace to society, that an order be made herein giving the care, custody, and control of said child Herbert to said affiant.

"S. J. ROGERS.

"Subscribed and sworn to before me this 20th day of August, A. D. 1891.

[Seal] "J. S. BELRUDE,
"Notary Public."

S. L. Rogers for appellant; T. C. Crowley for respondent.

SHARPSTEIN, J.—On the fourth day of September, 1885, appellant and respondent, formerly husband and wife, were divorced by a decree of the superior court of Marin county. The decree provided, among other things, that respondent should have the custody of the son of said parties, and that appellant should pay her $5 per month for the support and maintenance of said son. On the twenty-fourth day of August, 1891, the court, on the application of respondent, made an order that appellant pay to respondent $10 per month for the months of July and August, 1891, and thereafter $20 per month for the support of said child. Respondent filed an affidavit in support of her application, and appellant filed one against it. The court made the order as above stated, and appellant appealed from it to this court. As to the sum necessary for the support of said child, the affidavits are conflicting, and the sum allowed is not so large as to suggest an abuse of discretion by the court. Therefore we cannot interfere with the order. But appellant insists that the court erred in striking out a part of his affidavit. An examination of the part stricken out satisfies us that the matter stricken out was impertinent and scandalous, and that it was properly stricken out.

Order affirmed.

We concur: De Haven, J.; McFarland, J.

PRIOR v. DIGGS.

No. 14,874; October 1, 1892.

31 Pac. 155.

Sale of Goodwill—Action for Breach.—Defendant sold to plaintiff the goodwill of his "saddlery, harness, and carriage trimming business," and agreed not to enter a like business in the same place while plaintiff, or anyone deriving title to the goodwill from him, was engaged in such business. Later he engaged in a general merchandise business in that place, and, among other things, sold horse blankets, buggy robes and dusters, whips, and collar pads. Held, in an action for breach of contract, that evidence showing that such articles did not belong to the saddlery and harness business, but were articles of general merchandise, was admissible to prove there was no breach of contract.

Witness—Expression of Opinion.—Where a witness states that he "does not consider" or "does not think," etc., such expressions are not expressions of opinion, merely, as witnesses are not required to give their testimony with absolute positiveness.

APPEAL from Superior Court, Yolo County; C. H. Garoutte, Judge.

Action by T. M. Prior against Marshall Diggs for breach of contract. Judgment for defendant. From the judgment and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. C. Ball for appellant; F. E. Baker and Clark & Aram for respondent.

BELCHER, C.—The plaintiff commenced this action on November 24, 1888, to recover damages in the sum of $2,000 for the alleged breach of a written contract, which reads as follows:

"Whereas, I, Marshall Diggs, of the county of Yolo, state of California, have this day sold to T. M. Prior, of the same place, the good will of the saddlery, harness, and carriage trimming business lately carried on by me in the town of Woodland, in said county, now, therefore, in consideration of said sale and of the sum of two hundred and twenty-five dol-

lars, gold coin of the United States, to me in hand paid by the said T. M. Prior, I hereby covenant and agree to and with the said T. M. Prior that, so long as the said T. M. Prior, or any person deriving title to the good will of said business from him, shall carry on a like business within said town, I will not, directly or indirectly, either for myself or as the agent or employee of any other person, carry on, or aid in carrying on, at any place within said town of Woodland, the business of saddlery, harness making, or carriage trimming, or the selling of saddles, harness, carriage trimmings, or other articles usually sold, or which I have been accustomed to sell, in connection with said business, or any other business usually carried on in connection therewith or subsidiary thereto. And whereas, from the nature of the case, it would be extremely difficult to fix the actual damage arising from a breach of this contract, now, therefore, it is hereby agreed that the sum of two thousand dollars shall be presumed to be the amount of damage sustained by a breach of this contract, and the said amount is hereby fixed and agreed upon as liquidated damages for such breach. Witness my hand this 17th day of January, A. D. 1883.

"M. DIGGS."

By his answer the defendant denied all the averments of the complaint, and set up numerous defenses. The case was tried before a jury, and the verdict and judgment were in favor of the defendant. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order. The Civil Code provides that "the goodwill of a business is the expectation of continued public patronage" (section 992), and that "the goodwill of a business is property, transferable like any other" (section 993). It also provides that "every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void" (section 1673), except that "one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein" (section 1674). Here the goodwill sold was only that "of the saddlery, harness, and carriage trimming business," and the question is, Did the defendant vio-

late his contract by thereafter carrying on "a similar business" while the plaintiff was carrying on "a like business"?

The facts proved and bearing on this question are, in substance, as follows: Prior to his sale to the plaintiff, defendant had been engaged in the saddlery, harness and carriage trimming business for about a year, and, among other things, had kept and sold to his customers "horse blankets, buggy robes and dusters, whips, and collar pads." In June, 1883, he bought in with Freeman & Co. as a partner in a general merchandise store, situated upon the same street and within a few feet from the place where the saddlery business which he had sold to the plaintiff was then being carried on. He remained in business as a member of the firm of Freeman & Co. until October, 1884, when he bought out his partners, and afterward conducted the business at the same place in his own name. His business was principally the sale of hardware, agricultural implements, wagons, carriages, and buggies; but when he went in with Freeman & Co. there were in stock, and for sale, in the store, horse blankets, buggy robes, and dusters, whips, and collar pads, and he afterward kept and sold some of each class of such goods and enumerated articles each year, down to the time of the commencement of this action. In October, 1883, the plaintiff sold and transferred the business, the goodwill of which he had purchased from defendant, to one Barney, but did not assign to him the contract on which this action is based; and in November, 1884, Barney sold and transferred the said business back again to plaintiff. After his purchase from Barney, the plaintiff continuously, up to the time of the trial, carried on in the town of Woodland "the business of saddlery, harness, and carriage trimming, and, in connection therewith, kept for sale, and sold therewith, robes and dusters, horse blankets, whips of all kinds, collars and collar pads, and other articles." It was claimed by the plaintiff in the court below that the sale of horse blankets, buggy robes, etc., was a part of the saddlery and harness business, and that defendant, by selling these articles after he bought in with Freeman & Co., violated his contract, and rendered himself liable for the stipulated damages. On the other hand, the defendant claimed that the articles named were general merchandise, and that the sale of them was not a part of any particular business or trade.

Upon this question the plaintiff's witnesses testified that the sale of the said articles was a part of the saddlery and harness business, and as much a part of it as the sale of any other article sold in connection therewith. The same witnesses, however, testified, on cross-examination, that the articles were sold in connection with other businesses, that they were sold in grocery stores and carriage repositories, and that more of them were kept and sold in general merchandise stores than in harness-shops. One of the witnesses for defendant testified that he had been in business in Woodland for thirty years, and had kept general merchandise for sale; that he did not "consider horse blankets, buggy robes, or lap dusters or collar pads or whips, as belonging to the saddlery, harness, or carriage trimming business"; and that they were recognized as articles of general merchandise. And the defendant testified to the same effect, and, among other things, said: "I don't think they belong to any particular business. They are articles of general merchandise. They are so usually sold in all classes as general merchandise, in dry-goods stores, hardware stores, and especially whips and robes are sold with carriages in carriage repositories"; and that after he bought in with Freeman & Co., in connection with his hardware and agricultural business, he kept a carriage repository, and kept carriages and buggies on hand for sale. Defendant further testified that the plaintiff had every opportunity to know he was selling these articles; that plaintiff was often in his place; that the robes, whips, and blankets were lying in the most prominent places near the door, where people could see them; and that plaintiff made no objection before the commencement of this action. The testimony on both sides as to the sale of the said articles in connection with other classes of business than the saddlery and harness business was objected to by plaintiff, and it is urged that the court erred in admitting it. We see no error in the rulings. The evidence tended to support the defendant's theory, and was admissible for that purpose. It is further urged that the defendant's witnesses only stated that they did not "consider" and did not "think," etc., and that these were expressions of opinion, merely, and hence not sufficient to create a conflict in the evidence. We cannot accede to this view. Witnesses are not required to give their testimony with absolute positiveness: 1

Greenleaf on Evidence, sec. 440; Hoitt v. Moulton, 21 N. H. 588. The witnesses, however, did state positively that the said articles were articles of general merchandise, and, if this was so, they did not belong to any particular trade or business. We think there was a substantial conflict in the evidence upon the question under consideration, and that the verdict and judgment cannot, therefore, be disturbed. In view of what has been said, it would subserve no useful purpose to consider the other questions discussed by counsel. We discover no error which could affect the result, and therefore advise that the judgment and order be affirmed.

We concur: Haynes, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

BANK OF YOLO v. WEAVER et al.

No. 14,827; October 1, 1892.

31 Pac. 160.

Corporation—Borrowing Money.—A Resolution of the Board of directors authorizing the secretary to borrow money for the corporation is sufficient, though not entered on the minute-book, and, therefore, in an action against stockholders to recover the money so borrowed, the admission in evidence of a resolution adopted by the board and entered on its minutes is immaterial.[1]

Corporate Stock—Evidence of Ownership.—Evidence that a person subscribed for stock is not sufficient proof that he actually owns the shares, when it does not appear that he bought them on credit, but rather that he was to pay for them at once, and it also appears that he did not pay or offer to pay for them, and that no certificate of them was ever issued to him.

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[1] **Cited** and followed in Boggs v. Lakeport Agricultural Park Assn., 111 Cal. 357, 43 Pac. 1107, a suit on a corporation mortgage, when the resolution looking to its execution, not being of record, was proved by extrinsic evidence.

Cited with approval in Ismon v. Loder, 135 Mich. 348, 97 N. W. 771, which also involved a corporation mortgage. It was urged that there was no record available to the effect that two-thirds of the stockholders had voted for the giving of the mortgage.

APPEAL from Superior Court, Yolo County; C. H. Garoutte, Judge.

Action by the Bank of Yolo against N. M. Weaver and others to recover from defendants their proportionate share of money borrowed from plaintiff by the Woodland Woolen Manufacturing Company, in which company defendants were stockholders. From a judgment for plaintiff, and an order refusing a new trial, defendants appeal. Affirmed.

F. E. Baker and Craig & Hawkins for appellants; E. R. Bush for respondent.

FOOTE, C.—This action was brought to recover of certain stockholders of a corporation designated as the Woodland Woolen Manufacturing Company their proportionate shares of certain moneys alleged to have been borrowed from the plaintiff, the Bank of Yolo, by the first-mentioned corporation. Judgment was given in favor of the plaintiff, from which, and from an order refusing a new trial, this appeal is taken. The facts surrounding the transaction seem in brief to be that the Woodland Woolen Manufacturing Company was in need of money to get into operation, and by written resolution of its board of directors, spread upon its minute-book, ordered that its president and secretary give a note to the Bank of Yolo for $15,000, as "security for overdrafts." At the time this action was instituted the manufacturing corporation owed the Bank of Yolo about $19,214.97, for moneys drawn from bank, a portion of the same in pursuance of the written resolution authorizing the note, and the balance of borrowed money by the vote or resolve of the board of directors, which vote or resolve was not spread in writing upon the minutes in the corporation's book. But the evidence is sufficient, as we think, to show that all of this money was borrowed from the bank by the authority of the board of directors of the manufacturing corporation, and was used by it for its exclusive benefit. Therefore, the objection made by the defendants to the introduction in evidence of a resolution of the board of directors, and entered in the minutes after suit brought, ratifying the acts of the treasurer in borrowing and using for the purposes of the corporation all of the money

sued for in this action in excess of what the written resolution called for authorizing the note, is untenable. The right of recovery here did not depend upon this alleged ratification; it depended primarily upon the authorization of the board in writing as to $15,000, and, as to the balance, upon the vote or resolve of the directors not reduced to writing, and upon the fact that this money was borrowed and applied to the uses of the corporation. Such a corporation cannot receive the benefits and uses of an executed contract, and then deny its obligation: Main v. Casserly, 67 Cal. 129, 7 Pac. 426; Bradley v. Ballard, 55 Ill. 413; Pixley v. Railroad Co., 33 Cal. 198, 91 Am. Dec. 623; Foulke v. Railroad Co., 51 Cal. 365. Therefore, whether the resolution of ratification made after suit brought was improperly admitted or not, which we do not decide, is immaterial, as the cause was tried by the court, and the evidence was ample without it to fix the liability of the defendants, and it does not appear that the court rested its decision upon that resolution: Mitchell v. Beckman, 64 Cal. 123, 28 Pac. 110.

But the appellants further object that the complaint did not state facts sufficient to show a cause of action, in that it does not sufficiently show how many shares were subscribed for, so as that, from such statement and the statement of what number of shares each defendant owned, it can be determined what was their proportionate share of the indebtedness or liability. The allegation objected to runs thus: "That 305 shares of the capital stock of said Woodland Woolen Manufacturing Company, and no more, were taken, subscribed, and fully paid for." This, we think, was sufficient under the demurrer as filed: Bidwell v. Babcock, 87 Cal. 29, 25 Pac. 752. We perceive nothing of merit in the point raised as to the supplemental complaint; if not good as such a complaint, it stated a good cause of action as an amended complaint.

It is further alleged that Mr. Walker, one of the defendants, owned twenty shares more of stock than it is found by the court that he owned, and that he should have been held for a proportionate share of the indebtedness on those shares of stock. It is true that the evidence is that he subscribed for those shares, but it does not appear that he bought them on a credit, but rather that he was to pay for them at once,

and it also appears that he did not pay or offer to pay for them, and that no certificate of them was ever issued to him, and that they were never really sold to him. While the evidence is not so convincing as to render it absolutely certain that such was the state of facts, yet it tends, as we think, to show that he did not own them, and hence we do not feel disposed to recommend the disturbance of the finding as to that matter. Upon the whole record we perceive no prejudicial error, and we therefore advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

FARLEY v. MORAN et al.

No. 14,868; October 4, 1892.

31 Pac. 158.

Railroads—Bond to Build Fences.—In proceedings to condemn land for a railroad, the complaint prayed the court to ascertain, in accordance with Code of Civil Procedure, section 1248, the cost of fences along the line of the road, and of cattle-guards where necessary, and a bond for the construction of the fences was given, with the sureties required by section 1251. Held, in an action to recover from the sureties for violation of the bond, that, since the principals had taken possession of the land and built their railroad, sufficient consideration had passed to support the contract in the bond, even if the bond given was not a statutory one.

Suretyship—Violation on Part of Sureties.—In an action against sureties for violation of a bond by the principals it is not necessary to allege any violation on the part of the sureties.

Railroads—Bond to Build Fence.—Where a Company Violates a bond to construct a fence along its railroad through plaintiff's land, plaintiff need not construct the fences before bringing an action on the bond.

Railroads—Bond to Build Fence.—In an Action for Violation of such a bond it need not be alleged or proved that the fences agreed to be built are necessary.

APPEAL from Superior Court, Lassen County; W. F. Masten, Judge.

Action by Catherine Farley against Moran Bros. and J. W. Doyle and J. C. Wimple for violation of a bond. From a judgment for plaintiff defendants Doyle and Wimple appeal. Affirmed.

Spencer & Raker for appellants; Goodwin & Goodwin for respondent.

FOOTE, C.—This action is on a bond executed by Moran Bros. as principals, and J. W. Doyle and J. C. Wimple as sureties. The principals were never served with summons, and judgment was rendered against the sureties only. From that, and an order refusing a new trial, the defendants bring this appeal.

The bond was given under a proceeding for the condemnation of land for a public use; that is, for the building of a railroad. Those proposing to condemn the land were not associated as a corporation, but as copartners. It is provided in section 1244, Code of Civil Procedure, what parties may file a complaint in such an action; and the principals of the bond involved here are such parties as are included in the provisions of that statute. In section 1248, among other matters which must be done by the court, jury, or referee in assessing the damages by way of compensation to the owner of the land sought to be taken for a public use, is this: "That, if the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle-guards where fences may cross the line of such railroad," must be ascertained and assessed by court, jury, or referee upon the legal testimony offered. The complaint in the action for condemnation proceedings, in which the bond in suit was given, prayed that this statutory provision should be complied with, and, in accordance with that prayer, the provision of the law was complied with. The sureties on the bond given in that proceeding under section 1251, Code of Civil Procedure, and against whom a judgment for a breach of the conditions of the bond was made and given in this action, now claim that the bond is void, and cannot

be the basis of a recovery in the action. Their argument in support of this proposition is that, as to parties such as the principals on the bond and the defendants here, such a bond could, under the statute, only be given as compensation for damages done to the plaintiff's land, or the taking of the same for a public use; and that such a bond is not the just compensation "first made or paid into court" for the land owner, as is required by section 14 of article 1 of the state constitution; that, therefore, the statute which authorizes such a bond as to the parties here giving it is unconstitutional, and the bond unauthorized by any valid law, and entirely void as a contract. The principals of this bond, however, prayed the court to proceed as it did in the condemnation suit, and have the damages ascertained and assessed for the fences required by the statute. They voluntarily gave the bond, and by virtue of that took possession of the plaintiff's land, and devoted it to a public use; that is, the building of a railroad. They thus received a consideration sufficient to support the contract contained in the bond, even if it be not a statutory bond. Upon a similar question, this court said: "We will not permit a party having complied with the terms proposed, and availed himself of the advantage of the order to question its correctness": Battelle v. Connor, 6 Cal. 140. And it was said in Hathaway v. Davis, 33 Cal. 169: "Nor is the point that the appeal from the judgment was not taken within time, and that for that reason the undertaking of the sureties was without consideration, available to the defendants. Concede that the undertaking did not operate to legally stay proceedings under the judgment (a point which we do not decide), yet it in fact had that effect, and the appellants received all the benefit for which their sureties contracted; and, were they now allowed to say that their undertaking was nudum pactum, gross injustice might be done to the plaintiff, because he did not choose to act upon a doubtful right." The cases cited in opposition to this view are not, as we think, in point.

It is further insisted that the complaint fails to state a breach of the contract sued on. It is said in this connection that the bond requires the money to be paid into court, and that the complaint does not allege that it has not been paid into court, and therefore the demurrer should have been sustained. An inspection of the bond shows that the contention is not sound. The money was obligated to be paid to the

plaintiff in the event of the failure of the Moran Bros. to build the fence, and the complaint alleges that the Moran Bros. have not paid the plaintiff any portion of the money which the bond obliged them to pay upon their failure to build the fences. It is further alleged that no breach of the bond is alleged as to the sureties; that the breaches alleged are only those of the principals. We do not perceive any force in this argument. The sureties were bound to pay on the failure of the principals to comply with the obligation, and it is alleged that they did not comply with it in a certain respect. The appellants argue further, in support of their position, that the demurrer should have been sustained, because the complaint does not state that the plaintiff had built the fences. We are unable to perceive wherein the law compels her to do this as a condition precedent to being paid the money wherewith to do it, which the defendants obligated themselves to pay. Certainly the case of Butte Co. v. Boydston, 64 Cal. 117, 29 Pac. 511, cited by appellants in aid of this contention, affords no support therefor. When the railroad or other obligor in the bond fails to build the fences according to the obligation, the case cited, supra, declares that "the land owner may sue upon the bond," just as has here been done. If the land owner obtains the money due upon a bond, and then does not build the fences, it is declared in that case that the land owner is responsible to the railroad company in certain cases; but nowhere is there any intimation in that case that the owner of the land shall build the fences before bringing suit on the bond, when the obligors have failed to build them. The appellants urge further, as a reason for the reversal of the judgment and order, that there was no allegation in the complaint, proof adduced, or finding made that the fences were necessary. The bond did not contain anything which limited the responsibility of Moran Bros. and their sureties to build necessary fences only. The bond being valid, under the circumstances of this case, a recovery could be had without alleging, proving, or finding anything outside of its terms. We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

WADE v. WADE.

No. 13,814; October 20, 1892.

31 Pac. 258.

Husband and Wife—Maintenance—Condonation.—The act of a wife, in allowing the husband to return and cohabit with her, after she has obtained a decree for separate maintenance on the ground of desertion, amounts to condonation, although done under the impression that her refusal would furnish ground for divorce; and the maintenance, therefore, must be discontinued.[1]

APPEAL from Superior Court, City and County of San Francisco; E. R. Garber, Judge.

Application by Annie Wade against John C. Wade, her husband, for an order requiring defendant to show cause why a separate maintenance obtained by her should not be increased. Defendant asks that the maintenance be discontinued altogether, and appealed from an order refusing such discontinuance. Reversed.

W. D. Daingerfield for appellant; J. D. Sullivan for respondent.

TEMPLE, C.—The parties are husband and wife. In 1884 plaintiff brought suit under section 137 of the Civil Code to obtain a decree for a separate maintenance, charging the defendant with desertion. She obtained a decree March 5, 1885, requiring defendant to permit her to continue to occupy her then residence, which was a house belonging to defendant, and awarding her $27.50 per month for her support. A few days after the decree was entered, to wit, as early as March 20, 1885, defendant returned to plaintiff, since which time the

[1] **Cited** with approval in McIlroy v. McIlroy, 208 Mass. 464, Ann. Cas. 1912A, 936, 94 N. E. 696, where the court points out that the act of the wife in resuming cohabitation does not ipso facto release the husband from the duty to pay, but is a matter of evidence to be considered upon his making a proper application to be released.

Cited in the note in Ann. Cas. 1912A, 937, on the effect, on an order or decree for the payment of alimony or support money, of reconciliation of the parties.

parties have cohabited together as husband and wife. August 14, 1889, upon the application of plaintiff, an order was obtained from the superior court of the city and county of San Francisco, requiring defendant to show cause why the allowance should not be increased. The defendant appeared and made his showing in answer to the order, and, among his reasons why the allowance should not be increased, alleged "that ever since the month of September, 1885, said plaintiff and this defendant have lived together, occupying the same house and cohabiting together as husband and wife," and asks that the decree be vacated and set aside. It is claimed that the act alleged amounts to condonation. The parties seem agreed that, if there had been a condonation, the allowance should be discontinued. Whether the facts show a condonation is the point to be determined. It is claimed that she consented to matrimonial intercourse through a misapprehension of the law. She has a horror of divorce, and feared he would have a cause of action against her to obtain one, unless she consented. It is also claimed that, admitting that the acts of the plaintiff amount to condonation, still such condonation has been revoked, under section 121 of the Civil Code, by conjugal unkindness on the part of the defendant, which, though not amounting to a cause for divorce, is sufficiently habitual and gross to show the conditions were not accepted in good faith. Neither party seems to have had the slightest suspicion that the resumption of marital relations would have any effect upon the right of the wife to her monthly allowance, for the husband faithfully paid it month by month. If this constituted a mistake of law, it was mutual. But I think it did not amount to that. Plaintiff says she did not wish her husband to get a divorce, and consented to marital intercourse to prevent his having a good ground for a divorce. In this case she was not at all in error. It did have that effect, and it would seem from this that she at least fully understood the consequence of the act. But her willingness to restore conjugal relations resulted from the false impression that her refusal would furnish a ground for divorce. Forgiveness is an amiable trait, and it is a pity that she simulated a virtue for a personal end, but the effect must be the same. Why she did not wish her husband to get a divorce is utterly immaterial. Suppose she had condoned her husband's offense under the mistaken im-

pression that by so doing she could control his testamentary power over his property. It would have been a mistake, but not a mistake as to the effect of the act in restoring conjugal relations. In fact, as in this case, the mistaken policy itself would make more evident the intent to rehabilitate the marital relation. She exacted no conditions for the condonation, and, if she had, I think there was no evidence of habitual gross unkindness sufficient to show that the condonation had not been accepted in good faith. It was rude to call her a "judicial pauper," but the language imputed nothing beyond the fact that he was paying a forced allowance for her support. That he was not sociable and did not always eat with her cannot, under the circumstances, be called gross unkindness. I think the order should be reversed and the court directed to enter an order discontinuing the separate maintenance.

We concur: Foote, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is reversed, and the court below is directed to enter an order discontinuing the separate allowance.

RICKS et al. v. LINDSAY.

No. 14,856; October 29, 1892.

31 Pac. 262.

Findings—Refusal of Court to Adopt.—It being the duty of the court to find on all issues without any request, refusal to adopt a requested finding prepared by counsel is not error, the only thing necessary being that the findings cover all the issues and be sufficient.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by A. A. F. Ricks and others against N. G. Lindsay. Judgment for defendant. Plaintiffs appeal. Affirmed.

Weaver & Crowe for appellants; J. N. Gillett for respondent.

BELCHER, C.—It is alleged in the complaint in this case that the plaintiffs were the owners, as tenants in common, of a strip of land in the city of Eureka, described as a strip fifteen feet wide, and extending from the southeast corner of Tenth and H streets southerly along the east side of H street one thousand and eighty-one feet, and that on the thirteenth day of May, 1890, the defendant unlawfully entered upon the said strip, and took down and removed therefrom a fence placed thereon by plaintiffs, to their damage in the sum of $250, for which they prayed judgment. The answer of the defendant alleged that the said strip of land was and is a part of H street, an open public highway within the corporate limits of the city of Eureka, and that the plaintiffs had no right to the use, occupation, or possession of said strip, or any part thereof; that during all the times mentioned in the complaint defendant was the city marshal of said city, and that the common council thereof had power to regulate all streets in the city, of which H street was one; that on or about the first day of May, 1890, the plaintiffs unlawfully encroached upon and obstructed the said street by building the said fence thereon; that on the sixth day of May, 1890, the corporate authorities of the city passed an order or resolution directing defendant, as city marshal, to remove all obstructions on H street; and that defendant thereafter, acting under said order, and not otherwise, removed said fence from said strip quietly and peaceably, the same being a public nuisance. The case was tried by the court, without a jury, and, after finding sundry probative facts, the court found as follows: "That the land described in plaintiffs' complaint is a portion of that part of H street lying between said Tenth and Fourteenth streets, and is a strip on the east side thereof, fifteen feet wide and one thousand and eighty-one and eight-tenths feet long. That in the month of April, 1890, plaintiffs inclosed said strip of land with a fence. But subsequently, and prior to the bringing of the action, the plaintiffs themselves tore down that portion of said fence erected between Tenth and Eleventh streets, leaving involved in this action only the fifteen feet extending from Eleventh to Fourteenth streets. That the defendant, acting as marshal of the city of Eureka and under the direction of the common council thereof, removed said fence from said strip of land lying between Eleventh and Thirteenth streets

and from said H street. That defendant removed the same quietly and peaceably, and that said act of defendant in so removing the same is the alleged act of trespass complained of by the plaintiffs herein, and none other." And the court further found, as conclusions of law, as follows: "(1) That H street, from Tenth to Fourteenth streets, as above set forth, is a public street for travel, seventy-five feet wide, for all persons having occasion to go that way on foot or with teams; (2) that the fence removed by defendant was an encroachment upon and an obstruction to said H street, and the defendant had the right to remove the same therefrom, and is entitled to a judgment for his costs herein expended." Judgment was accordingly entered that the plaintiffs take nothing by their action, and from that judgment and an order denying their motion for a new trial they have appealed. The motion for new trial was made upon a bill of exceptions, which contains numerous specifications of errors in law committed by the court, but no specifications, or attempted specifications, of the particulars in which the evidence is alleged to be insufficient to justify the decision. Only one error in law is referred to in the brief of appellants, and we may assume, therefore, that the other alleged errors are waived. But, whether waived or not, it is enough to say of them that we think the rulings of the court were proper. The error relied upon is that the court refused to adopt a certain finding of facts which plaintiffs prepared and requested the court to make. It does not appear that any exception was taken to this refusal, but, conceding that the point can be made without an exception, still we see no error in the action of the court. Under our present system of practice, the court is bound to find upon all the issues without any request to do so, and the parties here have no right to dictate as to what findings shall be adopted. Requests for findings are therefore unnecessary, and it is not error to disregard them.

The only question is, Do the findings cover all the issues, and are they sufficient? Pereira v. Smith, 79 Cal. 232, 21 Pac. 739. The only other point made for a reversal of the judgment and order is that the conclusions of law were not justified by the facts found. The point is argued upon the theory that it does not necessarily result from the probative facts found that the strip of land in controversy was a part of

H street, and so dedicated to public use. We do not think this point can be sustained. The probative facts found do, in our opinion, plainly tend to show that the strip was a part of the street, and was dedicated to the use of the public. It is not, however, necessary to determine whether the conclusions drawn by the court necessarily result from these facts or not. The court, as we have seen, also found, as an ultimate fact, "that the land described in plaintiff's complaint is a portion of that part of H street lying," etc. That finding evidently justifies the conclusions of the court, and, as it is not assailed, it must be accepted as true. It follows that the judgment cannot be reversed upon any of the grounds urged, and we therefore advise that it and the order denying a new trial be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

DARDEN v. CALLAGHAN.

No. 14,862; October 29, 1892.

31 Pac. 263.

Conversion—Agreement to Sell.—Where Suit was Brought for the conversion of goods sold to defendant, but which plaintiff claimed had previously been sold to him, and the evidence, instead of showing a sale to plaintiff, tended only to show an agreement to sell, and that the goods should remain with the seller until a certain time, and be paid for on or before delivery, an instruction giving the essentials of a contract of sale is improper, as the belief might thus be induced that, under such a contract, plaintiff would have sufficient title to maintain the suit.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Daniel Boone Darden against Bartholomew Callaghan. From the judgment and order denying a new trial, defendant appeals. Reversed.

Ford & Burnell for appellant; J. W. Turner for respondent.

TEMPLE, C.—This appeal is from the judgment and order denying a new trial. The action was to recover damages for the conversion of personal property, and was tried with the aid of a jury. Both parties claim to have purchased from one Dolly Edwards, who first sold or agreed to sell to plaintiff, and then to defendant. Whether the transaction with plaintiff was a sale or only an agreement to sell was an important issue in the case, for, if it were the latter only, he had not such a title as would enable him to maintain this action. The only evidence upon that subject is the testimony of the plaintiff himself. He says, in substance, that he deals in second-hand goods; that the vendor came to his place of business on January 2, 1891, and asked if he would buy her furniture. The same day (Friday) he called and made an inventory, and the next morning offered her $290 for it. She said she would let him know whether she would accept or not, and shortly after came, as he says, "and told me I could have the goods; that they were mine. I paid her $50 on the goods, and told her I would pay the balance that evening." He took a receipt for the money as follows: "Eureka, Cal., January 3, 1891. Received from D. S. Darden, on furniture, fifty dollars. Miss D. Edwards." She was going away, and wanted him to leave the goods there until Monday, so she could use the house, and save the expense of an hotel, and plaintiff consented. He testified: "Everything was placed as it would be fixed up in a house. The carpets were tacked down. The house was a two-story house, and both floors were furnished, including the halls. In the afternoon she came back to the store, and offered to return the $50. I was not present, and my clerk would not take it." On cross-examination he testified: "Question. The question I asked you was this: Are you positive that, according to your agreement, you were to pay her the balance of the money that evening, and leave the goods there until Monday? Answer. Yes, sir; I was." On the same day that the contract was made with the plaintiff, and before he had tendered the balance of the purchase money, defendant bought the goods, paid for them, and they were delivered to him.

It seems evident from plaintiff's testimony that the goods were not to be delivered to plaintiff until paid for. If

defendant had not purchased, plaintiff would not have been entitled to demand the goods on Monday without having paid or offered to pay for them; and had they been destroyed by fire in the meantime, it seems equally plain that the loss would not have been his. If the price is to be paid before or on delivery, the title does not pass until payment is made. There was here neither delivery nor payment of the price: Blackwood v. Packing Co., 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248, and authorities there cited. There being no conflict in the evidence upon this subject, and no chance for construction, and both parties accepting the evidence as true, its effect, as constituting a sale or an agreement to sell, was a question of law for the court. The evidence did not tend to prove more than an agreement to sell. That would not confer title, without which plaintiff cannot maintain this suit. At the request of plaintiff, and over the objections of defendant, the court instructed the jury as to what was essential to a valid contract of sale, under the statute of frauds. Such an instrument was not pertinent to any issue in this case, and may have been prejudicial, as calculated to induce the jury to believe that a valid agreement for the purchase of the property would confer upon plaintiff sufficient title to maintain the action. Indeed, it is difficult to imagine any other purpose in giving it. I can imagine no circumstance which can justify such an instruction in a case of this character. I cannot see how the rule found in section 3294 of the Civil Code could be made applicable in this case, even had there been evidence tending to establish a sale to plaintiff, rather than a mere agreement to sell. I think the verdict is against the evidence, and that the court erred in the respects mentioned, and that the judgment and order should be reversed and a new trial had.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial ordered.

GEORGESON v. CONSUMERS' LUMBER CO. (BUHNE, Intervener).

No. 14,649; November 1, 1892.

31 Pac. 257.

Sheriff's Sale—When will be Set Aside.—In a proceeding by a judgment defendant to set aside a sheriff's sale it appeared that 600,000 feet of lumber belonging to the execution defendant were sold to claimant for $700, and that the sale was made in lump for a grossly inadequate sum. Held, that the sale was properly set aside.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Proceeding by the Consumers' Lumber Company to set aside a sheriff's sale on execution issued on a judgment in favor of Georgeson against said company, in which proceeding Buhne, Jr., intervened, and claimed the property as purchaser under the sale. From an order setting the sale aside, plaintiff, Georgeson, appeals. Affirmed.

Ernest Sevier and Coonan & Sevier (Horace L. Smith of counsel) for appellant; J. W. Turner for respondent.

PATERSON, J.—Plaintiff recovered judgment against the defendant in the court below for the sum of $1,034.58. Thereafter an execution was regularly issued on the judgment, and levied upon 600,000 feet of lumber belonging to the defendant. The lumber was sold by the sheriff to the intervener, Buhne, Jr., on May 20, 1891, for the sum of $700. This is an appeal from an order vacating and setting aside the sale referred to. The court below evidently believed that the sale was improperly made in a lump and for a grossly inadequate sum, and there is abundant evidence to show that such were the facts. Indeed, the court would have abused its discretion, we think, if upon the evidence before it the motion to vacate the sale had been denied. Hudepohl v. Mining Co., 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025, cited by appellant, is not in point. That was an action in equity to set aside a sale of several disconnected parcels of land which had been sold en masse. The

defendant therein was a vendee of the original purchaser without notice of any irregularity. There was nothing to show that a larger sum would have been realized from the sale if the property had been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the writ. A number of technical objections were made in the court below, and the rulings of the court thereon are urged here as error. It is sufficient to say that there is no merit in any of the objections.

The order is affirmed.

We concur: Harrison, J.; Garoutte, J.

JONES v. CHALFANT et al.

No. 14,290; November 1, 1892.

31 Pac. 257.

Ejectment — Instruction on Evidence.—In ejectment, plaintiff showed title by patent from the government, and defendant's title was a sheriff's deed on foreclosure of a mortgage given by plaintiff prior to receiving his patent. Plaintiff did not attack the foreclosure proceedings, nor object to their admission in evidence. In instructing the jury, after stating the evidence, the court directed a verdict for defendant, "if these facts all appear" as stated. Held, that by thus instructing the jury there was no violation of the constitution, article 6, section 19, which provides that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."[1]

Dismissal and Nonsuit—Demand for Entry of Judgment.—Code of Civil Procedure, section 581, provides that an action may be dismissed, or judgment of nonsuit entered, "when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months." Held, that where defendant, on receiving a verdict, prepared a draft of judgment, and

[1] **Cited** and approved in Gately v. Campbell, 124 Cal. 523, 57 Pac. 567, where the court goes even further, saying: "In a case where there is no conflict of testimony and the plaintiff could not recover under the facts as shown by the testimony, the judge could even instruct the jury what their verdict should be."

requested the clerk to make the entry, the verdict should not be dismissed, though the clerk neglected for more than six months to enter the same.

APPEAL from Superior Court, Mendocino County; R. McGarvey, Judge.

Ejectment by David Jones against John E. Chalfant and others. Defendants had judgment, and plaintiff appeals. Affirmed.

Thomas H. Bond for appellant; T. L. Carothers for respondents.

BELCHER, C.—This is an action of ejectment to recover possession of one hundred and sixty acres of land in Mendocino county. The case was tried before a jury on June 15, 1889, and on that day a verdict was returned and entered in favor of the defendants. Immediately after the entry of the verdict, the defendant's attorney prepared the draft of a judgment, and handed it to the clerk of the court, with a request that he enter the same. The court did not order the case to be reserved for argument or further consideration, or grant a stay of proceedings, but the clerk failed to enter the judgment until September 12, 1890. The plaintiff moved for a new trial on a prepared statement of the case, and his motion was denied on April 26, 1890. On September 3, 1890, the plaintiff gave notice to defendants that he would move the court to set aside the verdict and decision on the ground that no judgment had been entered in the case, and defendants had neglected to demand and have judgment entered therein for more than six months after they were entitled thereto. This motion was heard by the court, and denied, on September 12, 1890, and an order was then made directing the clerk to enter the judgment, and he accordingly did enter it on the same day; to all of which the plaintiff duly excepted. The plaintiff appeals from the judgment and from the order denying his motion to set aside the verdict.

The facts shown by the bill of exceptions are, in substance, as follows: The plaintiff, to show title in himself, introduced in evidence a patent from the United States, granting to him the demanded premises, dated April 9, 1881. The defendants

...ien, to show that the title had passed from the plaintiff, and ...as vested in one of themselves, introduced evidence showing ...hat the plaintiff and his wife mortgaged the land described ...n the patent to one Aaron Chalfant, to secure payment of a ...promissory note, on July 23, 1874; that the mortgage con...tained the words "grant, bargain, and sell"; that the note and the mortgage were duly assigned by Aaron Chalfant to John E. Chalfant, one of the defendants; that afterward the mortgage was duly foreclosed by John E. Chalfant, and, under an order of sale issued in pursuance of the decree, the property was sold to him by the sheriff of the county; that there was no redemption from the sale, and afterward, on March 20, 1883, the sheriff executed and delivered to the purchaser his deed of the property; and it was admitted that under a writ of assistance issued in the foreclosure case the plaintiff was ejected from the land by the sheriff. Upon these facts the case was submitted. The plaintiff requested the court to give to the jury a certain instruction, which it refused, and said: "I shall instruct this jury to find for the defendants." The court then stated the evidence to the jury, and concluded by saying: "If these facts all appear to your minds as I have stated them, then your verdict will be for the defendants in this case. Swear an officer. You need not retire unless you want to appoint one of your members foreman."

1. Appellant contends that the court, by its instructions, violated section 19 of article 6 of the constitution, and for that reason the judgment should be reversed. The section referred to provides: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." There is nothing in the record to show that the plaintiff in the court below objected to the foreclosure proceedings, or in any way attacked their regularity, or asserted their insufficiency to pass the title to the property to the purchaser. Nor is there here any such objection. It is true that the mortgage antedated the patent, but it purported to mortgage the property in fee, and in such case it is well settled that the after-acquired title inures to the benefit of the mortgagee: Civ. Code, sec. 2930; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Kirkaldie v. Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Christy v. Dana, 42 Cal. 174; Vallejo Land Assn. v. Viera, 48 Cal. 572; Camp v. Grider, 62 Cal. 20; Orr v. Stewart,

67 Cal. 275, 7 Pac. 693. Under these circumstances, there was nothing to be determined in the case except a question of law, and the court was justified in telling the jury what the verdict should be.

2. The appellant also contends that the court erred in not granting his motion to set aside the verdict. Section 581 of the Code of Civil Procedure provides: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: . . . . (6) By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months." The plaintiff's motion was not a motion to dismiss the action, but, in effect, was a second motion for new trial. But, conceding that the motion might be made under the provision of the code above quoted and relied upon, still that provision is not mandatory, and does not confer an absolute right to the dismissal: Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121. The defendants did not neglect to demand that the judgment be entered in proper time; and, while it does not appear that they paid or tendered to the clerk the fee for the entry, it does not appear that they did not do so. In view of the action of the court, it will be presumed, therefore, that the failure to enter the judgment was the result of the negligence of the clerk, and not of the defendants. It follows that the judgment and order should be affirmed, and we so advise.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MAGNOLIA & HEALDSBURG FRUIT CANNERY v. GUERNE.

No. 14,302; November 9, 1892.

31 Pac. 363.

Dismissal of Action—Authority of Attorney.—Where the evidence warrants a finding that the attorney who brings a suit for a corporation against one of the stockholders was not authorized by the corporation to do so, it is proper for the court, on motion of defendant, to enter a judgment dismissing the action.

APPEAL from Superior Court, Sonoma County; John G. Pressley, Judge.

Action by the Magnolia & Healdsburg Fruit Cannery, a corporation, against George E. Guerne, a stockholder. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Barham & Bolton for appellant; Thomas Ruthledge for respondent.

McFARLAND, J.—The plaintiff is a corporation; the defendant is one of its stockholders. Defendant moved to dismiss the action upon the ground that it was brought without the authority of plaintiff, and that the attorney who signed the complaint was not the attorney of plaintiff, and had no authority to bring the action. The court granted the motion, and rendered judgment dismissing the action. Plaintiff appeals from the judgment.

It would serve no useful purpose to notice here in detail the evidence upon which the court below acted. It is sufficient to say that, in our opinion, the evidence warranted the finding that the attorney who brought the suit was not authorized by the corporation plaintiff to bring it. That being so, it was proper practice for the court to enter judgment dismissing the action: Turner v. Caruthers, 17 Cal. 431; Clark v. Willett, 35 Cal. 534.

The judgment is affirmed.

We concur: Sharpstein, J.; De Haven, J.

DAUBENBISS v. WHITE et al.

No. 14,519; November 10, 1892.

31 Pac. 360.

Public Land—Ouster of Occupant—Abandonment.—An occupant of public land who is ousted by a stranger will not be presumed to have abandoned his right to possession, where, after a contest for a year, he ceases to contend against a superior force maintaining an armed resistance.

Public Land.—In Ejectment to Recover Possession of public land, plaintiff claimed under a deed from D., who had occupied the land without color or claim of title. There was no evidence of any act of possession on plaintiff's part, and several witnesses testified that defendants were in possession of the land in July, 1889. Held, that the evidence did not support a finding that D. sold and delivered possession to plaintiff in August.

Deed—What Transferable by.—Bare Right of Possession, without claim or color of title, cannot be transferred by deed, nor otherwise than by the former possessor yielding up or abandoning the possession, and permitting a new possession to be taken by another.

APPEAL from Superior Court, San Benito County; James F. Breen, Judge.

Ejectment by John Daubenbiss against Amos White and others. The court found in favor of defendants for a part of the land, and in favor of plaintiff for the remainder. A motion for a new trial was overruled, and defendants appeal. Reversed.

Briggs & Hudner for appellants; Montgomery & Scott for respondent.

HAYNES, C.—In ejectment. Plaintiff bases his right to recover upon prior possession alone. The answer denied plaintiff's possession and his right thereto, alleged prior possession in themselves to part of the land, title in one Robinson to part, and their right to the possession of such part under a lease from the owner. The cause was tried by the court, without a jury. The court found in favor of defendants for the part they held under lease from Robinson, and in favor of plaintiff

for the remainder. Defendants moved for a new trial upon a statement, and this appeal is from the judgment, and the order denying a new trial. The transcript does not show the date at which the action was commenced, nor does it state the names of any of the defendants except that of Amos White. We gather from the findings, however, that the other defendants were L. M. Ladd, as administrator of the estate of C. H. Waters, deceased, and William Eastman. Prior to the trial the defendants White and Eastman succeeded to the interest of Waters, deceased. The land sought to be recovered is section 23, township 15 south, range 6 east, M. D., in San Benito county, and situate in the Gabilan mountains. Long prior to 1883 this section and other adjacent sections were in the possession of Root and Martelli, who used the same for grazing purposes, for which alone it was useful. This tract contained about three thousand acres. In 1883 C. H. Waters acquired all the right of Root and Martelli, and entered into possession, placed improvements thereon, consisting of fencing, houses, and a barn, and pastured his stock on the whole tract. Afterward Waters let White and Eastman into possession with him, but at what precise date does not clearly appear, and continued in the exclusive possession of the whole tract up to the year 1886, in which year the Dakan Brothers and one Burns acquired possession of sections 14 and 15, lying adjacent to section 23, and in May of that year drove their cattle upon section 23, and expelled Waters' stock therefrom. The court found, upon conflicting evidence, that Waters had a fence, which with the natural barriers inclosed the whole tract of three thousand acres, but that it was not sufficient to restrain or to turn stock without the aid of herders, and also found that there were fences, which with natural barriers nearly inclosed section 23; that these fences also, at the time of the entry of the Dakans, were generally prostrated, and insufficient, without herders, to turn stock; that the entry of the Dakans upon section 23 "was peaceably effected, and without passing through gates or tearing down fences." There appeared to have been disputes about the possession of other lands besides section 23 between Waters and the Dakans, but touching section 23 the court found: "This latter section continued to be the subject of frequent and grave disputes between the parties. These disputes led to a condition of armed hostility, in which

threats of violence were exchanged, firearms were exhibited, and melees indulged in. Continuously throughout this state of affairs, the Dakans maintained themselves in the possession of section 23 by force of arms and superior numbers. Finally, after about a year's contention, Waters recognized the superior might and right of the Dakans to the possession of section 23. The Dakans continued to herd their cattle thereon, and excluded all other stock therefrom until they sold out to the plaintiff. That in August, 1889, the Dakans sold and delivered the possession of section 23 to the plaintiff, who at the time last stated entered upon section 23 with a herd of cattle, and pastured the same thereon, to the exclusion of all others, until September, 1889, when the defendants entered, and ousted plaintiff from the possession and still exclude him therefrom." The defendants White and Eastman participated in the controversy with the Dakans respecting that section. The pre-emption entry of Robinson was perfected February 18, 1889, and covered the northwest one-quarter of the northwest one-quarter, and the east one-half of the northwest one-quarter of said section. The remainder of the land in controversy is government land, to which it is conceded plaintiff has no right unless he acquired a right of possession by an alleged conveyance from Dakan, or by otherwise obtaining a possession prior to that of defendants. Following the formal findings of fact in the transcript is the decision or opinion of the court, consisting of a restatement of many of the facts and conclusions therefrom, and arguments upon questions of law, and following which are conclusions of law "from the foregoing facts and opinion." From this decision, as well as from the findings, it is apparent that the court concluded that the acquiescence of Waters and his associates, the defendants, in Dakan's possession, destroyed his right based on prior possession. In its opinion, the court conceded that relief could not be granted where the plaintiff's possession was a mere scramble, or maintained by force, violence or threats; but added that this did not continue during the whole time of Dakan's possession. "Peace succeeded the hostilities, and he [Dakan] was not compelled to maintain himself by force or violence during the last year of his occupation"; and that it was not material whether the submission was compulsory and solely in the interest of peace. The findings, thus construed (and without the comments of the

court they could bear no other construction), do not justify the conclusions of law drawn therefrom, nor support the judgment. It would be monstrous that a right conferred by a prior peaceable possession could be lost after a contest kept up for a full year, simply by ceasing to contend longer with a superior force maintaining an armed occupation. The defendants might have resorted to law, but they were not bound to do so within a week, a month, or a year. They might safely await an opportunity to re-enter peaceably, as they afterward did. Their cessation from an armed contention cannot be construed as an abandonment of their prior right, and such right could only be lost by abandonment, or by the occupation of Dakin for the period of the statute of limitations. There is no finding, nor any evidence upon which any finding could be based, that defendants' entry, after the alleged possession of plaintiff, was not peaceably made and peaceably maintained.

But aside from this, if the findings as made were sufficient to support the judgment, the fourth finding is not justified by the evidence. This finding is that in August, 1889, the Dakans sold and delivered the possession to plaintiff, and that plaintiff then entered with a herd of cattle, and pastured the same, to the exclusion of all others, until the alleged ouster in September, 1889. Plaintiff testified that he "obtained the land in controversy from William Dakan; received a deed." The deed was offered and received in evidence against defendants' objection. The record nowhere shows the date of the deed, nor when it was delivered, but does show that "it was acknowledged December 14, 1889, after the commencement of the action." The plaintiff further testified that he did nothing to section 23; that he had an agent, his son, thereon, but did not know what he did. The son, F. B. Daubenbiss, testified that he went to this place the 3d or 4th of August, 1889; that as he was on his way to take possession, he met the Dakans with their cattle at Watsonville, forty or fifty miles from this land; that they (the Dakans) were to keep their cattle there until August 1st, but took them away before he got there, and that he reached the land two days after he met the Dakans at Watsonville. Neither he nor the plaintiff nor any witness testifies that either the plaintiff or his son had any cattle, or ever put any cattle on the land, or that any act of possession

was ever performed by or for the plaintiff. The Dakans had neither title nor color nor claim of title to the land. If by their occupation they had acquired any right, it was that of possession simply; a right which was wholly lost by their leaving the land, and removing their stock therefrom. All the circumstances show that they left without any intention of returning, and their leaving under such circumstances was an abandonment, and they could not put the plaintiff in possession after such abandonment. Nor would it aid plaintiff's case if the deed had been delivered, as it possibly was, before the commencement of the action, or when he met the Dakans at Watsonville, or before they left the land, for the reason that a bare right of possession, without claim or color of title, cannot be transferred by deed, nor otherwise than by the former possessor yielding up or abandoning the possession, and permitting a new possession to be taken by another. A deed only transfers title and the incidents flowing from title, or some right, as of possession, where the right depends upon title. In Society v. Dalles City, 107 U. S., at page 344, 27 L. Ed. 545, 2 Sup. Ct. Rep. 672, the court said: "All persons, therefore, who settled upon the public lands acquired no rights thereby, as against the government. They were merely tenants by sufferance. The most they could claim was the right of actual occupancy as against other settlers. Such an occupant could yield his right of actual possession to another settler, but he could convey no other interest in the land. If he abandoned the land, and another settler occupied it, the former lost all right to the possession. If he transferred the possession to another, and the transferee abandoned the land, the first possessor could claim no right in the land unless he again took actual possession." And on page 345, 107 U. S., and page 679, 2 Sup. Ct. Rep., in relation to the transfer in the case then under consideration, the court said: "The method adopted by the appellant to turn over the station to the American board by an actual transfer of possession was as effectual as any could be. It could be done only by yielding the actual occupancy, and this could not be effected by a written transfer. It could be accomplished only by the going out of one party, and the going in of the other." If it be said that the Dakans had improvements on the land which might be the subject of transfer, the deed was inoperative for that

purpose, as it only purported to convey the land, and, being ineffective for that purpose, did not convey or transfer improvements upon the land. Besides, by the abandonment of the land, the Dakans lost all right to the improvements, if any they had. Section 1013 of the Civil Code provides: "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section 1019, belongs to the owner of the land, unless he chooses to require the former to remove it." Section 1019, above referred to, permits a tenant to remove certain things affixed to the premises during the continuance of the term. Not only is there no evidence that plaintiff ever had possession of the land in question, but there is evidence strongly tending to prove that defendants were in possession and had their stock on section 23, in July, 1889. Defendant White testified that in July, 1889, he drove everything off section 23 except his own stock; that he also saw Eastman's cattle on section 23 during the early part of 1889; and that he had been in possession, and had a man on section 23, since July, 1889. Harry Waters testified that in July, 1889, he had helped White drive one hundred and fifty head of Dakan's cattle off section 23, and saw some of White's cattle on the place at the time. Appellants also attack the finding that the entry of the Dakans was without passing through gates or tearing down fences; and that the fences were generally prostrated. The findings, as well as the evidence, show that Waters and his associates, the present defendants, were in actual possession of section 23 prior to the entry of the Dakans. It was not at all essential to such actual possession that the land should have been inclosed with a fence sufficient to turn stock, or that it was fenced at all. In McCreery v. Everding, 44 Cal. 246, the court below charged the jury that: "Neither complete inclosures nor any inclosures at all are essential to a possession of land. If the claimants, although they had no fences, yet exercised dominion and control over the land, and subjected it to their power, the matter of fences becomes immaterial and unimportant"; and this court, approving the instruction, said: "It is well settled that actual possession of land may be had without fences or inclosure": See, also, Sheldon v. Mull, 67 Cal. 300, 301, 7 Pac. 710; Goodrich v. Van Landigham, 46 Cal. 603. The only importance

properly attaching to the fences in the case at bar is that they served to mark, in connection with the use made of the land, the boundaries of the actual possession by the defendants. Any other physical and visible signs, clearly indicating the extent of the possession, would have served the purpose. The fences were erected for the purpose of confining cattle to the range inclosed, and excluding the cattle of others, and, whether sufficient for that purpose or not, clearly marked the extent of their possession. The fact that the Dakans drove their cattle in without tearing down the fence and drove defendants' cattle therefrom did not affect the character of their entry. Several exceptions were taken to the rulings of the court on the admission and exclusion of evidence, which should be briefly noticed. The deed from Dakan was, as we have seen, immaterial, whether defective or not, and was improperly received. There is not enough shown in the transcript to enable us to determine whether the exclusion of the certificate of the surveyor general touching White's application to purchase the land described in the certificate was or was not erroneous. Neither the date nor the substance of the certificate is stated, nor does the transcript show that it covered the land in controversy, or any part of it. We find in the opinion of the court a description of the land described in the certificate, and the statement that it was offered for the purpose of proving title, while if offered generally, or for the purpose of proving color of title, it would have been competent. We are not disposed to pass upon a question so defectively presented by the record. It is not necessary, in many cases, to do more than to state in the record the substance of papers offered in evidence, but where any question is raised as to the effect of any written instrument, enough should be stated for that purpose, and if the whole instrument is essential to a proper construction, then it should be set out in full. The judgment and order appealed from should be reversed.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

BAKER v. BAKER et al.

No. 14,286; November 10, 1892.

31 Pac. 355.

Express Trust—Declaration in Writing.—Under Civil Code, section 852, subdivision 1, providing that no trust in relation to real property is valid unless created and declared "by a written instrument subscribed by the trustee," such a trust is sufficiently declared by a deposition of the trustee, made in an action wherein the question of the creation of such trust was involved, and by which it appears that he so held the property in question.[1]

Trust.—Where a Mother Conveys Real Estate to her son, in trust, the rents and profits thereof to be used for her support, and on her death the estate to be equally divided among her heirs, and the son and other heirs voluntarily partition the same among themselves, before the mother's death, such son or his wife should not afterward be allowed to complain of such partition on the ground that it was made in violation of the trust.

Trust.—In an Action by the Son's Wife to Set Aside one of the partition deeds, on the ground that she did not join therein, there is no prejudicial error in refusing to allow her to introduce the judgment-roll of an action by the mother against the son, his wife, and the other heirs, to set aside the partition and enforce the trust, and wherein it was decided that the property was not held in trust, but that defendants therein, as against the mother, were the owners of the parts partitioned to them.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Isabella L. Baker against Andrew T. Baker and Mary T. Baker to set aside a deed of certain land. Judgment for defendants. Plaintiff appeals. Affirmed.

J. D. H. Chamberlin for appellant; Buck, Wheeler & Cutler for respondents.

BELCHER, C.—This action was commenced in the superior court of Humboldt county on the fifteenth day of

[1] Cited in the note in 38 L. R. A., N. S., 647, on whether the statute of frauds can be satisfied by a declaration of trust signed by the trustee alone.

March, 1889, and it is alleged in the complaint that the plaintiff is, and at all times mentioned therein was, the wife of Erastus J. Baker; that on the twenty-second day of January, 1879, she and her husband were the owners in fee and possessed of a certain described tract of land situate in Humboldt county, and containing twenty acres, more or less, and that on the day named her husband filed and caused to be recorded a declaration of homestead on the said land, in which all the facts necessary for the selection of a homestead were fully and truly set out; that the homestead was never abandoned, and thereafter, on the twenty-ninth day of September, 1886, the husband executed to the defendants a deed of the said land, in which she refused to join; that under the said deed the defendants entered into possession of the land, and have ever since claimed, and now claim, the sole and entire ownership thereof, to the exclusion of and in hostility to the plaintiff; that such claim of ownership and possession is a cloud upon plaintiff's title, and prevents her from having the full enjoyment of her homestead rights. Wherefore, she prays that the deed to defendants may be declared null and void, and that she be restored to the possession of the land. The defendants answered, denying all the averments of the complaint, and by way of cross-complaint set up facts showing that the land in controversy, with other land, was held by their grantor in trust for them and others, and that the deed complained of was made and delivered in execution of that trust. The plaintiff answered to the cross-complaint, denying most of its averments, and alleging that the affirmative defense set up therein is barred by the statute of limitations, and also by a former judgment rendered in an action, in which Elvira B. Wolverton was plaintiff, and Erastus J. Baker and others were defendants. The court below found the facts and rendered judgment in favor of the defendants, and from that judgment and an order denying her motion for a new trial the plaintiff appeals. After an elaborate discussion of the matters involved in the case, the learned counsel for appellant says in his brief: "This appeal turns entirely upon two questions: (1) Are the findings relating to the alleged trust supported by the evidence? (2) Did the court err in the introduction and rejection of evidence to sustain or refute the said trust?" The material and ad-

mitted facts of the case are as follows: In 1878, Elvira B. Baker was the owner of eighty acres of land in Humboldt county, of which the land in controversy was a part. She was a widow, seventy-three years of age, and had four children, Erastus J. Baker, Andrew T. Baker, Alonzo T. Baker, and Mary A. Church. On the third day of December, 1878, she, by a bargain and sale deed, expressing a consideration of $10, conveyed to her son Erastus all of her said land, and on the thirtieth day of the same month, for the expressed consideration of $1, she executed to him a second deed of the land. In the first deed there were some errors in the description of the property, and the second deed was made to correct those errors. At the time of the execution of these deeds, Erastus had a wife and three children, and was residing on the land conveyed to him, near the house of his mother, and was the only one of the three brothers who lived in the county. On the twenty-second day of January, 1879, Erastus filed and had recorded a declaration of homestead upon the said eighty acres, in which he stated that he was the head of a family, and was actually residing with his family upon the land described, and that he intended to claim and use the same as a homestead, and estimated its value to be $4,500.

On the first day of January, 1879, the mother, Elvira, married one B. F. Wolverton, and on the 12th of July of that year Erastus executed to her and her husband a written lease of about five acres of the land for the term of the natural life of the lessees, and at an annual rent of one cent. In June, 1885, Alonzo and his then wife, the defendant Mary, executed to Erastus a deed conveying to him all their right, title, and interest in and to the said eighty acres, and for this conveyance Erastus paid Alonzo $1,000 in cash. Alonzo afterward died during that year, and his widow subsequently married the defendant Andrew. In September, 1886, the two surviving brothers and sister partitioned the said eighty acres among themselves, as follows: The defendants and Mrs. Church conveyed all their right, title, and interest in and to forty acres thereof to Erastus; Erastus and the defendants conveyed all their right, title, and interest in and to twenty acres thereof to Mrs. Church; and Erastus and Mrs. Church conveyed all their right, title, and interest in and to the twenty acres thereof here in controversy to the defendants.

Upon receiving their deed, defendants entered into possession of the parcel so conveyed to them, made valuable improvements upon it, and have ever since resided thereon. In March, 1887, the mother, in the name of Elvira B. Wolverton, commenced an action in the superior court of Humboldt county, in which Erastus and his wife, the plaintiff here, Andrew and his wife, the defendants here, and Mrs. Church were made defendants. In her complaint the plaintiff alleged, among other things, that in December, 1878, she was the owner of a described tract of eighty acres of land, and that "reposing a personal confidence in said defendant Erastus J. Baker, and by the mutual consent of said plaintiff and said defendant, and without any valuable or other consideration given or agreed to be given therefor," she, "being of the age of seventy-three years or thereabouts, and infirm in mind and body, and desiring to make a suitable provision for her future support and maintenance, as well as to secure the proper distribution thereof to her heirs at law upon her death, transferred and conveyed the said lands and premises to said defendant Erastus J. Baker, upon the sole and only consideration that the said defendant should hold the same in trust for said plaintiff, and that the rents, issues, and profits and proceeds thereof should be applied in providing for and maintaining said plaintiff during her natural life in a manner suitable to her station and condition in life, and, upon her death, in trust for the benefit of, and to be delivered in equal proportions to, her heirs at law aforesaid"; that Erastus voluntarily accepted the transfer and conveyance, and "agreed with and promised this plaintiff that, in consideration of the transfer and conveyance to him of said lands and premises as aforesaid, he, said defendant, would hold the same in trust for this plaintiff, would apply the rents, issues, profits, and proceeds thereof to the providing for and in maintaining this plaintiff during her natural life, and at her death that he would hold the same in trust for and would deliver the same to, her heirs at law in equal proportions"; that Erastus accepted the conveyance with intent to wrong, cheat, and defraud the plaintiff out of the title to, and the uses and benefits of, the said lands, and that he had violated his trust by mortgaging the land, filing a homestead thereon, and conveying described portions thereof to the other defendants, who had notice of

the trust. And the prayer was that it be adjudged that plaintiff is the owner of the lands described, and that whatever title thereto is held by the defendants, or either of them, is held in trust for the use and benefit of the plaintiff; that all of the defendants be required to make proper conveyances of the property to the plaintiff; and that the homestead of Erastus and Isabella be declared null and void. The defendants all answered jointly to the complaint, and after trial judgment was entered, in and by which it was "ordered, adjudged, and decreed that the plaintiff is not the owner of the lands and premises described in the complaint herein, but that defendants, as against the plaintiff, are the owners thereof, in severalty, in fee simple, of the several distinctive pieces or parcels of land mentioned and described in the complaint herein, free and clear of any and all the trusts, exceptions, limitations, and conditions set forth and alleged in said complaint"; and also that the homestead carved out of the land "by the defendant Erastus J. Baker and Isabella L. Baker, his wife, be, and the same is hereby, adjudged a valid homestead, free and clear of any and all the trusts, exceptions, limitations, and conditions set forth in the complaint herein." That judgment was never reversed or modified, and it is the same judgment pleaded by the plaintiff in bar of the defense set up in the cross-complaint. While that case was pending, Erastus made, subscribed, and swore to a deposition to be used in the case, and the defendants here introduced that deposition in evidence for the purpose of showing that the trust set up and relied upon by them had been declared by a written instrument, subscribed by the trustee, in a manner sufficient to meet the requirements of section 852 of the Civil Code.

It appears that the deponent, after stating that the lands in controversy in that case were conveyed to him by his mother, without any money consideration paid therefor, gave, among others, answers to questions propounded to him as follows: "Question. On September 28, 1886, Andrew T. Baker, Mary T. Baker, and Mary A. Church conveyed to you certain land, a portion of that property? Answer. Yes, sir. Q. The consideration expressed in that deed is one dollar? A. Yes, sir. Q. For what purpose was that deed made? A. Well, as a settlement between us. Q. Settlement of what? A. Of an

interest in the property. Q. Andrew T. Baker had no interest, had he? A. If one had, another had. Q. You have told us already in this examination that the land was conveyed to you for you and Mrs. Church? A. I also told you that some of my brothers thought they ought to have the same interest as the rest of us. Q. That did not affect Andrew T. Baker, did it? A. If one had an interest, my brother had an interest, too. Q. So, then, at the time these deeds were made you considered that all the children of your mother had an interest in the property? A. Yes, sir. Q. At the same time you, Mary T. Baker, and Andrew T. Baker conveyed certain land to Mary A. Church? A. Yes, sir. Q. At that time you recognized the fact that Mary A. Church had a certain interest in that land which stood in your name? A. Yes, sir. Q. At the same time you and Mary A. Church made a deed to Andrew T. Baker and Mary T. Baker? A. Yes, sir. Q. Was that deed made for the same purpose? A. The same purpose. Q. Then at that time you recognized the fact that Andrew T. Baker held an interest in that land? A. Yes, sir. Q. Then, if I understand your testimony correctly, at the time these several deeds were made you recognized the fact that you held this land in your name for your sister, your sister in law, and your brother? A. Yes, sir. Q. You held it that way for them, and these deeds were made for the purpose of straightening out their several interests? A. Yes, sir; that is what they were for." Mrs. Wolverton, the mother, was called as a witness by defendants, and testified as follows: "Question. What I want to know is, at the time this deed was made to E. J. Baker, what was the consideration of the deed—why it was—what it was that induced you to make that deed? Answer. I deeded it to him so that the children could have it after me. It was my wish that the children should have it after I was gone. Q. That was the reason you made this deed to Erastus? A. Yes, sir." The defendants also introduced and read in evidence the several deeds above referred to, between the brothers and sister. The evidence given by the several witnesses on direct and cross-examination was quite voluminous, but we have referred above to the most material parts of it.

The first question, then, is, Was it sufficient to justify the findings in relation to the alleged trust? In our opinion, this

question must be answered in the affirmative. A valid trust in relation to real property may be declared by a written instrument subscribed by the trustee: Civ. Code, sec. 852. And the statute will be satisfied if the trust is declared by any writing subscribed by the trustee in which the fiduciary relations between the parties can be clearly read. The writing may be executed simultaneously with or subsequent to the conveyance, and may be of a most informal nature. Letters, recitals, memoranda, affidavits, depositions, and verified pleadings have been held sufficient: 1 Perry on Trusts, sec. 82; 2 Pomeroy's Equity Jurisprudence, sec. 1007; 2 Reed's Statute of Frauds, sec. 845; Garnsey v. Gothard, 90 Cal. 603, 27 Pac. 516. The deposition read in evidence was a sufficient declaration in writing to satisfy the requirements of the code, and from it it clearly appears that Erastus took and held the legal title to the land conveyed to him by his mother in trust for his brothers and sister. And this conclusion is greatly strengthened by the fact that he bought out one brother's interest, and voluntarily joined with the other brother and sister in fairly partitioning an equal share in the property to each. It is objected, however, by appellant that, conceding Erastus held the property in trust for his brothers and sister, still it was a trust to be executed only after the death of the mother, and as they proceeded to partition the property before her death they thereby violated the trust, and are entitled to no relief in a court of equity. But the mother is not now complaining that the property was prematurely divided. When she failed in her efforts to get it back for her own use, she ceased to have any interest in its retention by Erastus till her death. And it having been voluntarily divided by Erastus, we do not think he or his wife should now be heard to complain of the division on this ground.

The next question is, Did the court err in its rulings upon the admission of evidence? Most of the evidence offered by the defendants was objected to by the plaintiff, and the objections were overruled, and exceptions reserved. It is unnecessary to speak of these rulings separately. We see no material error in them. The evidence was admissible, and the court properly overruled the objections.

In rebuttal the plaintiff offered in evidence the judgment-roll in the case of Wolverton v. Baker et al., before referred

to. The defendants objected to the offered evidence "on the ground that it did not bind the parties to this suit in any way, shape, manner, or form." The court sustained the objection, and the plaintiff excepted. It is urged for appellant that this ruling was erroneous; "that the judgment-roll offered estops the defendants in this action, and should have been admitted in evidence." And it is said: "The question of the same trust between the same parties, and the effect of the judgment in that case has been determined by this court"; citing Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54. The case cited was a second action of the mother against her children, in which she again sought to have her deeds to Erastus set aside. The children pleaded in bar of the action the judgment in the first case, and the trial court sustained the plea. In deciding the case on appeal, it was said by the court: "This judgment was palpably erroneous upon the facts found, but nevertheless it prevents a relitigation of the matters determined." And again: "It is a shameful thing that a son should refuse to support his aged mother, after obtaining her property, without consideration, upon the conditions mentioned. But the law must be declared." By the judgment pleaded in bar in that case, and offered in evidence here, it was adjudged that the defendants did not hold the property in trust for the plaintiff, and it was also adjudged "that defendants, as against the plaintiff, are the owners thereof in severalty of the several distinctive pieces or parcels of land mentioned and described in the complaint herein." The plaintiff here was one of the defendants in that action, and, if the judgment can be said to operate at all as an estoppel between the defendants, we think it should be held to estop her from now claiming that the defendants here were not the owners in severalty of the parcel of land mentioned and described as owned by them. There was therefore no prejudicial error in this ruling. Looking at the whole record, we see no good ground for reversal, and therefore advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SHIRLEY v. BOARD OF TRUSTEES OF COTTONWOOD SCHOOL DISTRICT et al.

No. 14,348; November 10, 1892.

31 Pac. 365.

Mandamus will not Lie to Compel School Trustees, who have wrongfully dismissed a teacher before the completion of her contract, to issue an order for the full amount of her salary, where no demand was made on them.

APPEAL from Superior Court, San Benito County; James F Breen, Judge.

Application by Ada Shirley for a writ of mandamus to compel the board of trustees of Cottonwood school district, and E. Moore and others as members, to issue an order for the balance of salary alleged to be due her as a school teacher. A judgment was entered that plaintiff was entitled to a peremptory writ, and defendants appeal. Reversed.

M. T. Dooling for appellants; Briggs & Hudner for respondent.

BELCHER, C.—This is an appeal by the defendants from a judgment awarding the plaintiff a peremptory writ of mandate, and the case is brought here for review on the judgment-roll. The court found the facts of the case to be in substance as follows: In July, 1890, the defendants were the duly elected, qualified, and acting trustees, and constituted the board of trustees of Cottonwood school district in San Benito county. The plaintiff was a duly qualified school teacher and on July 1, 1890, was employed by the defendants to teach the pupils of the Cottonwood school for the term of four months, commencing on the fourteenth day of that month. She was to receive, and agreed to accept, for her services $60 per month, payable monthly by orders drawn by the board on the county superintendent of schools. At the time named she entered upon the performance of her duties as such teacher, and continued to teach the school until August 23d, a period of six weeks, when the defendants, as such board of trustees,

wrongfully and without cause discharged and dismissed her from the school, and prevented her thereafter from teaching the school, and completing her part of the contract. She was ready, willing, able, and competent to teach the school and complete her contract, and repeatedly offered to do so, but the defendants, as such board of trustees, prohibited and prevented her from occupying the schoolhouse and teaching the school after the 23d of August. On August 23d, a majority of the board proposed to her that she teach the school two weeks longer, if at the end of the two weeks she would resign her place as teacher. She assented to this proposition, but demanded as a condition of her resignation that she be paid her salary for the full term of four months. The board refused to pay the full amount, but drew an order in her favor for the sum of $90, the same being in full payment for the time she had already taught. "No demand was made by plaintiff on defendants after the expiration of said four months, nor was any demand for the full term's salary made by her, other than as a condition for her resignation, as above set forth, and such demand was made on August 23, 1890." "Said discharge of plaintiff was for the alleged cause of incompetency as a teacher, and for cruel and unusual punishment of a pupil, but plaintiff was during all of said time competent as a teacher, and performed and fulfilled her duties properly as such, and did not punish said child either in a cruel or unusual manner, nor for any purpose except for just cause, and to a moderate extent, but said board of trustees in discharging plaintiff acted under the honest belief that plaintiff had punished the child excessively, and in a cruel and unusual manner." The court further found that the sum of $150 was due the plaintiff, and unpaid, for the balance of her salary under her contract, and as conclusions of law: "That plaintiff by the wrongful acts of defendants in ignoring the contract, and expelling plaintiff from said school, was exonerated from making formal demand for the issuance of an order on the superintendent of schools. That plaintiff is entitled to the peremptory writ of mandate compelling defendants, as said board of trustees, to issue to plaintiff the order upon the said superintendent of schools of San Benito county for the sum of one hundred and fifty dollars, but without costs." Judgment was accordingly so

entered. It is alleged in the complaint, and not denied, that, notwithstanding the action of the trustees in discharging her, plaintiff entered another house within the school district, and convenient for the pupils living therein, and taught the pupils of the district continuously from the time of her discharge up to October 31st, making full four months' service as a teacher, and thus fulfilling her contract. It is also alleged "that at the expiration of said four months plaintiff demanded of and from said defendants, the said board, that they issue to her the order for the amount due to her upon the county superintendent for payment thereof, but said board refused, and still refuses, to issue said order, or to pay the same, or any part thereof." And it is said in the brief filed on behalf of respondent that such a demand was in fact made. The allegation was, however, denied by the answer, and the finding upon it cannot therefore be controverted here. Upon the facts shown it is entirely clear that respondent was entitled to full payment for her four months' service; for, as said in Webster v. Wade, 19 Cal. 291, 79 Am. Dec. 218, "the law is well settled that where a contract for service is made for a fixed period, if the employer discharge the servant before the termination, without good cause, he is still liable, and the servant may recover the stipulated wages." The appellants, however, contend—and this is the only point made for a reversal of the judgment—that the respondent was not entitled to the relief demanded, for the reason that no express demand was made upon them to perform the act sought to be enforced before the proceedings were instituted. This point seems to be well taken. In People v. Romero, 18 Cal. 90, the court, by Field, C. J., said: "To authorize a mandamus it must appear not only that the performance of the act, to enforce which the writ is asked, is a duty resulting from the office, trust, or station of the party to whom the writ is to be directed but that the performance has been requested and refused." And the learned justice then quoted with approval from Tapp. Mand., as follows: "It is an imperative rule of the law of mandamus that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such demand,

either in direct terms, or by conduct from which a refusal can be conclusively implied; it being due to the defendant to have the option of either doing, or refusing to do, that which is required of him, before an application shall be made to the court for the purpose of compelling him." This language was again quoted with approval in Oroville & V. R. Co. v. Plumas County, 37 Cal. 362, and the same rule was declared in Price v. Land Co., 46 Cal. 434. The rule thus declared seems to be general, and to apply to all cases, except when the thing to be done is a duty to the public in which the petitioner has no special interest. "In such case," it has been said, "the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal": High on Extraordinary Legal Remedies, sec. 13. The court below based its conclusion, as we have seen, upon the fact "that plaintiff, by the wrongful acts of defendants in ignoring the contract, and expelling plaintiff from said school, was exonerated from making formal demand." But we do not think this conclusion can be sustained. We advise that the judgment be reversed and the cause remanded for a new trial.

We concur: Haynes, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for a new trial.

BULLOCK et al. v. CONSUMERS' LUMBER CO.

No. 14,813; November 10, 1892.

31 Pac. 367.

Jury—Right of Court to Call.—Though both parties to an action which Code of Civil Procedure, section 592, provides must be tried by a jury, unless a jury trial is waived, waive the trial by jury, the court has the right to call a jury for the trial of the cause.[1]

Contract for Saw-logs—Testimony as to Party's Understanding. In an action on a contract for saw-logs sold and delivered the controversy was as to the meaning of a clause in the contract which stated that the logs were "to be scaled by licensed scalers by the quarter scale, with ten per cent deducted for waste." It was claimed that the terms "by the quarter scale" and "for waste" were technical terms, having a particular meaning in the locality where the timber was sold, and testimony of the licensed scalers was introduced to show their meaning. Held, that testimony of the one who made the contract on behalf of defendant, as to what he understood by the terms at the time he made the contract, was inadmissible.

Contract for Saw-logs—Extrinsic Evidence.—Defendant offered to prove by the same witness that by reason of his belief as to the terms of the contract he agreed to pay one dollar per thousand more for the logs than he would otherwise have paid, and also offered to show from the "mill tally" the quantity of merchantable lumber obtained from the logs. Held, that this evidence was properly excluded, the price as well as the mode of ascertaining the quantity of lumber being fixed by the contract.

Contract for Saw-logs—Testimony as to Understanding of Parties.—Defendant offered to prove that the words "for waste" in the contract were understood by both parties to mean the cut of the saw after the logs had been squared by the quarter scale, with all deductions for rot, rotten knots, sap, and shakes. Held, that the evidence was not admissible, unless defendant could show that those terms in the agreement have a technical meaning, and apply simply to the cut of the saw.

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[1] **Cited** and approved in J. L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N. C. 442, 49 S. E. 950, the court stating that, irrespective of the authorities and of constitution and statute, it would "be reluctant to hold that it was intended to deprive the trial court of a function so essential to its efficiency and so important to every well-regulated system of judicial procedure."

Corporation—Admissions of Officers.—The President and Managing Agent of a corporation have authority to make admissions in regard to the fulfillment of contracts which will be evidence against the corporation.[1]

Contract for Saw-logs—Decision of Scaler.—Where a contract provides that the logs shall be scaled by a licensed scaler, an officer authorized to pass on the merchantable character of logs, both parties, in the absence of fraud, are bound by his decision.

Contract for Saw-logs—Decision of Scaler.—Even if the purchaser was not bound by the inspection and decision of the scaler, yet if the defects which rendered the logs unmerchantable were plain and readily seen on ordinary observation, and there was no fraud on the part of the seller, and the purchaser, having full opportunity to observe the defects, made no objection, he would be bound by his acceptance.

APPEAL from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by N. Bullock, assignee of D. H. McFarland, and Harvey Pinkerton, against the Consumers' Lumber Company, to recover for saw-logs furnished defendant corporation under a contract. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. H. Chamberlin and J. W. Turner for appellant; Ernest Sevier, Coonan & Sevier and Ford & Burnell for respondents.

HAYNES, C.—This action was tried before a jury, plaintiffs had judgment against the defendant (a corporation), and this appeal is taken from the judgment, and from an order denying defendant's motion for a new trial. Both parties waived a jury trial, but the court, against the protest and objection of the defendant, called a jury. An exception was taken by the defendant, and this action of the court is assigned for error. Appellant contends that this action of the court was an irregularity which deprived defendant of a fair

[1] **Cited** and followed in Lowe v. Yolo County etc. Water Co., 157 Cal. 513, 108 Pac. 301, where the court, speaking of matter in the testimony, said: "Here was simply a statement by the official head of defendant to an applicant for water as to the condition upon which it would be furnished to him by defendant. It is only fair to assume that it was authorized by the defendant."

trial, and also that it was an error of law occurring at the trial, and cites sections 214 and 592 of the Code of Civil Procedure. Section 592 provides that certain actions therein named (of which this was one) "must be tried by a jury, unless a jury trial is waived or a reference ordered. . . . . In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury." Section 681 of the Code of Civil Procedure provides how and when a jury may be waived. This question was before the court in Doll v. Anderson, 27 Cal. 249. The court said, at page 251: "The court, however, has the right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury. Besides this, it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues of fact being tried by a jury instead of the court." The action there, as in the case at bar, was upon a contract. In McCarthy v. Railroad Co., 15 Mo. App. 385, the action was upon contract. Section 3600, Revised Statutes of Missouri of 1879, provided: "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered." The court said: "The right of trial by jury is deemed a valuable right, and is guaranteed in actions of law by our constitution. The effect of the above statute is merely to allow the parties to waive that right, if they should see fit to do so; but they do not extend so far as to oblige the judge to try the issues of fact in a case at law, although requested to do so by both parties, if he should deem it a proper case for trial by jury. . . . . Not only is there no abuse of discretion in this case, but, as the question is here presented, the very statement of it seems to suggest its answer. The trial by jury is the constitutional mode of ascertaining the facts in actions at law. Both parties were willing to waive this mode of trial, but the judge was not willing to take upon himself the burden of determining the facts, for reasons which were within his own breast, and which he was not bound to disclose. What more is it, then, than the case of one party to an action at law objecting that the facts were tried and ascertained in the usual mode pointed out by the constitution and laws?" Counsel do not cite any authority, and I know of none, that tends to sustain their contention.

This action was brought to recover a balance alleged to be due from defendant under a contract made September 1, 1890, wherein said lumber company (a corporation) was named as the first party, and McFarland and Pinkerton as the second parties. The question in dispute arose as to the proper construction of that part of said contract which reads as follows: "That said party of the first part agrees to buy from the parties of the second part five hundred thousand (500,000) feet of redwood lumber in logs, said logs to be delivered at the mouth of Dean's slough on or before the first day of January, 1891. Said logs are to be scaled by a licensed scaler, by the quarter scale, with ten per cent deducted for waste; only merchantable timber to be sold or bought under this contract. Said party of the first part agrees to pay for said logs when each 100,000 feet is delivered, and the whole to be paid in five installments. Said parties of the second part agree to sell and deliver said 500,000 feet of merchantable lumber in logs to the party of the first part at the mouth of Dean's slough on or before January 1, 1891."

Plaintiffs under this contract delivered at the place and within the time named a quantity of merchantable saw-logs, which were scaled by licensed scalers by the "quarter scale," and were found to contain, after deducting ten per cent for waste, the quantity required by the contract. The defendant contends that the contract required plaintiffs to furnish logs containing 500,000 feet of merchantable lumber; that, in addition to a deduction of ten per cent of the scale for waste, there must be an allowance for "rot, rotten knots, sap, and shakes," which would require a further reduction of thirty-five to fifty per cent; "that the term 'quarter scale' had a local meaning peculiar to Humboldt bay and nowhere else, and meant that each log should be squared at its smallest end, then deduct for the sawdust and saw-kerf, then throw off for rot, rotten knots, sap, shakes, and other defects, and the residue of the logs merchantable lumber"; and that the word "waste" had a local meaning, and meant the deduction under the "quarter scale" for the saw-kerf.

A large number of exceptions were taken to the rulings of the court upon questions of evidence, and to instructions given to the jury, and to requests to instruct, which were refused. Most of the exceptions, however, go to the question

as to what is the proper construction to be given to the contract, and the decision of that question disposes of nearly all there is in the case, including the objection to any evidence being given by the plaintiffs, upon the ground that "the complaint does not state facts sufficient to constitute a cause of action"; for only upon the theory that the contract required the plaintiffs to furnish "500,000 feet of merchantable lumber in logs" could the complaint be deemed insufficient. Appellant rests its contention mainly upon an alleged local meaning of the term "quarter scale." This term is used in an act of the legislature passed in 1878 (Laws 1877–78, p. 779, sec. 4), entitled "An act for the scaling of logs in the county of Humboldt," as "the rule known in the county of Humboldt as the quarter scale." This act also provided for the appointment by the board of supervisors of three or more surveyors of logs, who were required to take an oath of office, and to give bonds for the faithful performance of their duties, and who were to have the exclusive right to survey for hire all logs that might be required by any buyer or seller; and said act also defined a merchantable redwood log "to be at least sixteen inches in diameter at the smallest end, and at least twelve feet and two inches long."

Plaintiffs called as witnesses the two licensed scalers, McAdam and McMillan, who were employed by the parties and scaled the logs in question, each scaling a part. These witnesses testified in chief that they scaled the logs in question by the quarter scale, and, after deducting ten per cent for waste, they contained 500,000 feet. The scale bills, which were put in evidence, were made in duplicate, and one copy delivered to each of the parties at the time the logs were scaled. Upon cross-examination by defendant's counsel, Mr. McAdam testified that he measured the logs the way he understood the contract, a copy of which he had when he made the survey; that it seemed to him to be very plain how he should measure them. He was asked by counsel for defendant if he did not ignore that clause of the contract which said, "Nothing but merchantable timber to be bought or sold under this contract"; to which the witness replied, "I would understand that to mean merchantable saw-logs. Merchantable timber is not merchantable lumber." The witness, upon cross-examination, explained that "the term 'quarter scale'

has a meaning among loggers, millmen, and scalers. It is a rule laid down to determine the amount of square-edged boards contained in any log, without regard to its quality. By the quarter scale, a log is squared from its smallest end. The balance of the contents of the log is merchantable. If a log is not sound, scale it just the same"; and illustrated the operation as follows: "This log is forty inches in diameter and twelve feet long. To square that would make it thirty inches in diameter, which would bring it to a square. That would be thirty inches square and twelve feet long, with 900 feet in it. The sawdust would have to come out of that, and saw-scarf. There is generally enough on the outside to make up for the saw-scarf. That is the quarter scale." The other scaler, McMillan, upon cross-examination by defendant's counsel, said that the "quarter scale" was simply the name of a scale. That under it the diameter of the log was taken, say sixty inches; one-quarter of the diameter was taken off, which would leave forty-five inches, the square of the log. No other witnesses testified as to the meaning of the term "quarter scale."

Some questions put to witnesses for defendant, intended to have some bearing upon the meaning of that term, were excluded by the court, and require attention. A. W. Graham, who made the contract in question on behalf of defendant, was called as a witness by defendant, and was asked what he understood, at the time he made the contract, by the terms, "said logs to be scaled by a licensed scaler, by the quarter scale, with ten per cent deducted for waste." An objection by plaintiffs was sustained by the court; and counsel for defendant then offered to prove by the witness that he (the witness) understood that language in the contract to mean that the logs were to be scaled by the quarter scale in accordance with the custom of Humboldt bay; rot, rotten knots, sap, and shakes to be thrown out to make merchantable timber out of the scale, with ten per cent in addition to be thrown out. An objection was sustained to this offer and defendant excepted to both rulings.

The ruling was right. If the contract, through fraud or the mutual mistake of the parties, did not express their intention, it might have been revised on the application of the party aggrieved so as to express that intention (Civ. Code,

sec. 3399); but no mistake or misunderstanding was alleged in defendant's answer. Defendant stood upon the interpretation of the contract which the law would have put upon it. The first answer was a general denial; and for a second answer and counterclaim defendant set out the contract in full, and alleged, as a breach on the part of the plaintiffs, that they did not deliver, as required by the terms of said contract, any other or greater amount of "merchantable timber" than 312,000 feet, and claimed damages in the sum of $2,000. It is clear, therefore, that defendant did not claim that anything was omitted from the written contract which was intended to be inserted, or anything inserted that was not intended; for, if the counterclaim means anything, it meant that, under the construction they gave to the contract as written, they were entitled to 500,000 feet of merchantable lumber instead of merchantable logs. The rule is established, not only by the authorities, but by the code, that "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . . " (Civ. Code, sec. 1639); and "technical words are to be interpreted as usually understood by persons in the profession or business to which they relate" (Id., sec. 1645). If, therefore, the terms "quarter scale" and "waste," used in this contract, are to be regarded as technical terms, or as terms having a special signification given to them by local usage, proof can only be made of such local usage, or of the sense in which they were usually understood, and the testimony of a party as to how he understood them is immaterial and incompetent.

Defendant, after having put a question which was excluded, offered to prove by the same witness that, by reason of his belief as to the terms of the contract, he agreed to pay a dollar per thousand more for the logs than he otherwise would have paid. The refusal of the court to permit this evidence was proper, as was also the refusal of the court to permit the defendant to show by the "mill tally" the quantity of merchantable lumber obtained from these logs. The price, as well as the mode of ascertaining the quantity and quality of the lumber, was fixed by the contract, and could not be changed by the belief of the witness, or by the quantity of lumber of a quality not provided for in the contract, however it might be ascertained. Defendant also offered to prove, by

a witness on the stand, that the words "for waste" in the contract were understood by both parties to mean the cut of the saw after the logs had been squared by the quarter scale, with all deductions for rot, rotten knots, sap, and shakes. Upon plaintiff's objecting to the proof, the court ruled that he would sustain the objection, "unless defendant could show that those terms in the agreement have a technical meaning, and apply simply to the cut of the saw." No evidence of that character having been given or offered, the ruling was correct. If the testimony sought to be introduced by defendant were admissible, written contracts would be subject to all the doubts and uncertainties and opportunities for equivocation that attend oral contracts, and the rule in regard to the interpretation of written instruments would be virtually abrogated: Code Civ. Proc., sec. 1856. In the absence of technical words or phrases, whose meaning is obscure, the office of interpretation belongs to the court. In Verzan v. McGregor, 23 Cal., at page 344, the court, after saying that the execution, authenticity, and delivery of a written instrument are usually proved by parol, said: "But evidence of the declarations of the promisee as to his intention in taking the contract in that form, and as to his understanding of the meaning and construction of its terms, could have no effect in giving a construction to the instrument, as the court was bound to construe it according to its terms, and could not be aided by the declarations of the parties made at the time": See, also, Platt v. Jones, 43 Cal. 223; Hewitt v. Dean, 91 Cal. 11, 27 Pac. 423; Dwight v. Insurance Co., 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654.

Mr. McFarland, one of the plaintiffs (whose assignee in insolvency, N. Bullock, was afterward substituted in his stead), was called as a witness on behalf of the plaintiffs, and was asked the following question: "Did either the managing agent of the defendant, or its president or secretary, after the removal of the logs from the slough, ever admit to you the receipt of the five hundred thousand feet of lumber in logs provided to be delivered under this contract?" To this question defendant interposed two objections: "(1) That it was not shown that any person was authorized to make an admission which would bind defendant; and (2) that there was an express warranty upon the face of the contract that survives

the acceptance of the property." The objection was overruled, and the witness answered, "Both of them did." At the time the question was put, there was no evidence to show the authority of these persons to make admissions which would be evidence against the corporation defendant, other than their official designations specified in the question. That the president and managing agent were so authorized, I think may be presumed, inasmuch as a corporation can only act through its agents, and such authority in matters pertaining to the ordinary business of the corporation is implied in the designation of those officers. Whether the secretary may be presumed to have such authority it is not necessary to decide, for the reason that evidence was afterward given tending to show that he, with the president, conducted the business of the company at that time; and besides, the exclusion of the evidence could not have affected the result of the case; so that if the ruling was erroneous, so far as it related to this officer, the error was not prejudicial.

As to the second branch of the objection, the warranty only extended to the species of timber, "redwood," and that "only merchantable timber was to be sold or bought under this contract." The contract, however, provided that the logs should be scaled by a licensed scaler, an officer who was authorized to pass upon the merchantable character of the logs, and by his decision both parties were bound, in the absence of some fraud or artifice practiced upon the vendee by the vendor resulting in injury to the latter. It was not the case of an implied warranty, which arises in cases of sale for future delivery, where the buyer has no opportunity for inspection, but an inspection was provided for and had. But, if defendant was not bound by the inspection and decision of the scaler, yet, if the defects which rendered the logs unmerchantable were patent, plain, and readily seen upon ordinary observation, as the evidence in the case tends to show was the fact, and there was no fraud on the part of the plaintiffs, and the defendant had full opportunity to observe their defects, and made no objection, they would be bound by such acceptance. The conclusions reached as to the exceptions to evidence herein specifically noticed applied to a very large number of other exceptions, which raise the same or similar questions, and also apply to the exceptions taken to the in-

structions given to the jury and to instructions refused. The motion for new trial was properly denied. The evidence was amply sufficient to justify the verdict. It was expressly admitted that the quantity specified in the contract had been received, according to the scale actually made. If that scale, therefore, conformed to a proper construction of the contract, as we think it did, there was no conflict in the evidence as to the full performance of the contract on the part of the plaintiffs. The exceptions to the instruction given to the jury, as well as those refused, all involved the questions we have discussed, and do not require further notice. Finding no prejudicial error in the record, I advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

ELECTRIC IMPROVEMENT COMPANY v. SAN JOSE & SANTA CLARA RAILROAD COMPANY.

No. 14,423; November 12, 1892.

31 Pac. 455.

Verdict—Specifying Amount—Costs.—Code of Civil Procedure, section 626, provides that where a defendant establishes a claim for the recovery of money, in an action for the recovery of money, greater than the claim established by plaintiff, the jury must find the amount of the recovery. Held, that a verdict for defendant "for its costs" is not within the meaning of the statute, because such a verdict is for costs only, and there is no recovery by either party.

Contract—Action for Services—Evidence.—In an action to recover for services by plaintiff in constructing an electric railroad for defendant, and for damages by reason of defendant's failure to perform its part of the contract, defendant set up by way of counterclaim that plaintiff had abandoned the contract before completing the road, and it appeared that the road had been sold in an uncompleted state. Held, that evidence of the price for which it was sold was inadmissible, since such evidence would not affect the amount of damages defendant would be entitled to by reason of plaintiff's failure to complete the road.

APPEAL from Superior Court, Santa Clara County; F. E. Spencer, Judge.

Action on a contract by the Electric Improvement Company against the San Jose and Santa Clara Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Haggin, Van Ness & Dibble for appellant; F. B. Laine and Jackson Hatch for appellee.

HAYNES, C.—This action was brought by plaintiff to recover $1,196.59, alleged to be due from defendant under a contract for the construction and electrical equipment of a street railroad from San Jose to Santa Clara, and the further sum of $17,328.49 damages for an alleged refusal and neglect of the defendant to perform its part of said contract. The answer denied defendant's alleged failure to perform its contract, and that anything was due plaintiff; and by way of counterclaim alleged that plaintiff quit and abandoned the contract, to defendant's damage in the sum of $100,000. The cause was tried before a jury, which rendered the following verdict: "We, the jury in the above-entitled cause, find a verdict for the defendant for its costs." Judgment was entered upon the verdict in favor of the defendant for its costs in the sum of $273.50. Plaintiff took a bill of exceptions, and moved thereon for a new trial, which was denied, and appeals from the judgment and the order denying a new trial.

Appellant contends for a reversal upon two grounds:

1. That the verdict is void and insufficient to support the judgment, for the reason that it fails to specify the amount to be recovered. Section 626 of the Code of Civil Procedure provides: "When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery." If the jury find nothing in favor of the plaintiff, and did not find in favor of the defendant upon its counterclaim an amount exceeding the amount established by the plaintiff, the verdict would necessarily be for the defendant, and the defendant, on such verdict, would be entitled to costs. In such case the jury could not specify the

amount of any recovery, for there was no recovery by either party. There is nothing in the record to indicate that a different verdict was intended by the jury, or that it was based upon any other ground. The addition of the words, "for its costs," was harmless surplusage. The verdict, without this addition, would have given costs to the defendant, and hence the plaintiff was not prejudiced. Watson v. Damon, 54 Cal. 278, cited by appellant, is not in point. There the jury found for the plaintiff $2,250, with interest at ten per cent per annum from a given date, less the amount of notes of the value of $950, "with interest on said notes"; but neither the verdict nor the pleadings gave any basis for the computation of the interest on the notes. In Redmond v. Weismann, 77 Cal. 423, 20 Pac. 544, the verdict was: "We, the jury in the above-entitled action, find for the plaintiff." In that case the amount of plaintiff's claim stated in his complaint was not in controversy; the sole controversy being as to the liability of the defendant. This court refused to send it back for a new trial, judgment having been entered for the amount stated in the complaint.

2. Appellant's second point is that the court erred in not permitting the question, "For how much?" The pleadings show that the road was only partly constructed under the contract. The only recital in the bill of exceptions explanatory of the ground upon which the question was based is the following: "During the trial defendant was allowed to introduce, in support of its counterclaim for damages, evidence of the entire cost of the road constructed by it under the contract set forth in the pleadings. Whereupon Jacob Rich, a witness, and a director and treasurer of defendant, was asked by Mr. Haggin (counsel for plaintiff): 'Question. Has the San Jose and Santa Clara Railroad Company sold its road? Answer. Yes, sir. Q. For how much?'" Defendant's objection that it was irrelevant and immaterial was sustained. Appellant insisted that, if defendant sold the road for more than it had paid out, it could not have been a loss to it. The contract required the plaintiff to furnish certain electrical supplies, and to construct certain work. It was not a contract for manufacturing or furnishing certain articles for sale, but for the construction of a railway for use. The cost of the work, so far as it had proceeded, might tend

to prove, where the plaintiff abandoned the work before completion, that it would cost the defendant more than the contract price to complete the work the plaintiff had contracted to do, and so aid the jury in determining one item of the damage sustained by the defendant. That, and the loss of the use of the railway for the time the construction was delayed by plaintiff's breach, would ordinarily be the measure of defendant's loss; and a profit made by the sale of the road could not affect the amount of the defendant's recovery in such case. Counsel for appellant, in their brief, insist that the evidence of the entire cost of the road, so far as constructed, necessarily created the impression upon the jury that, if the road was a failure, and utterly worthless, the defendant's loss was the amount expended; but the record does not disclose any evidence tending to show that defendant claimed the work done to be worthless. We think the question was properly denied; but, if it was error, appellant was not prejudiced, as the jury did not award damages to the defendant. We find no prejudicial error in the record, and therefore advise that the judgment and order appealed from be affirmed.

We concur: Vanclief, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

GOLLIN v. LYLE.

No. 14,294; November 12, 1892.

31 Pac. 456.

New Trial—Discretion.—A Motion for a New Trial on the ground that the evidence does not sustain the verdict, is addressed to the discretion of the court, and its judgment thereon will not be disturbed unless clearly abused.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Ejectment by Walter W. Gollin against Mary E. Lyle. There was a verdict for defendant. From an order granting a new trial, defendant appeals. Affirmed.

J. D. Sullivan (W. H. L. Barnes of counsel) for appellant; Lloyd & Wood for respondent.

McFARLAND, J.—This is an action of ejectment. The defendant pleaded the statute of limitations. The jury found in favor of defendant; and the court below, upon motion regularly made by plaintiff, granted a new trial. The defendant appeals from the order granting a new trial. The motion was made upon the ground, among others, of the "insufficiency of the evidence to sustain the verdict"; and that was the main ground upon which the motion was granted, as appears from an opinion delivered by the trial judge. In such a case the trial court has a wide discretion, and we do not disturb its rulings, unless it clearly appears to us that such discretion has been abused; and it is quite clear that there was no such abuse of discretion in the case at bar.

The order appealed from is affirmed.

We concur: Sharpstein, J.; De Haven, J.

CAHILL v. COLGAN, State Controller.

No. 14,836; November 22, 1892.

31 Pac. 614.

State—Approval of Claims—Change in Examiners.—Where the state board of examiners have approved a claim, a subsequent change in the members of the board will not necessitate an approval by the new board to make the claim effective, the board being, in contemplation of law, the same board.

State—Approval of Claims—Drawing Warrant.—Political Code, section 672, provides that the state controller shall not draw his warrant for any claim unless it has been approved by the board of examiners, or has been "exempted" from the operation of this section. Held, that when a claim has been approved by the board, no exemp-

tion from the operation of this section need be shown to authorize the controller to draw his warrant for it.

State—Claims—Appropriation to Pay.—Where a Petition Recites that a claim was presented to the board of examiners, approved as chargeable to the state for expenses in a suit in which the state was a party in interest, transmitted with such approval to the legislature, and that the legislature appropriated money "to pay said claim" under an act entitled "An act making an appropriation to pay costs and expenses of suits in which the state is a party in interest," and authorized the controller to draw his warrant for the amount appropriated, such a recital sufficiently identifies the claim as the one for which the appropriation was made.

State—Claims—Action to Enforce.—Where, in a Petition for a claim which has been approved by the board of examiners the petition states that the amount and "value" of such services was $504, the word "value" is surplusage, and requires no proof.

State — Claims — Validity.—The Approval of a Claim by the board of examiners, and an appropriation of money to pay it by the legislature, is conclusive as to the validity of the claim as against the controller.[1]

Judgment—Presumption as to Sufficiency of Evidence.—Where a judgment contained the recital that it "duly appeared" to the court that the prayer should be granted, the presumption is that the court had sufficient evidence to justify the judgment.

APPEAL from Superior Court, Sacramento County; Van Fleet, Judge.

Application by P. H. Cahill for a writ of mandate to E. P. Colgan, as state controller, commanding him to draw his warrant on the state treasurer in favor of plaintiff for $504. From a judgment awarding a peremptory writ, defendant appeals. Affirmed.

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[1] **Cited** in Burns v. Superior Court, 140 Cal. 12, 73 Pac. 602, as an instance of the authority the legislature has to vest some powers of a quasi-judicial character in ministerial officers.

Cited in Sullivan v. Gage, 145 Cal. 766, 79 Pac. 540, as showing, apart from such exceptional cases as illustrated by Lawrence v. Booth, 46 Cal. 187, "that the state board of examiners does exercise, in the generality of cases, discretionary and judicial action, making their acceptance or rejection of a claim not only final but free from collateral attack."

Cited in Chapman v. State, 104 Cal. 697, 43 Am. St. Rep. 158, 38 Pac. 459, and said there not to be authority for the proposition that the rejection of the claim by the state board of examiners has the effect of a judgment, thereby barring an action by the claimant.

Attorney General Hart for appellant; J. C. Campbell and A. J. & Elwood Bruner for respondent.

VANCLIEF, C.—The court overruled a general and special demurrer to the petition for the writ, and thereupon the defendant answered. The court then sustained a general demurrer to the answer, and, defendant declining to amend his answer, judgment awarding a peremptory writ, as prayed for, was rendered. The defendant appeals from the judgment on the judgment-roll, and contends that the court erred in overruling defendant's demurrer to the petition, and also in sustaining plaintiff's demurrer to the answer.

The substance of the petition is as follows: That in July, 1889, the people of the state, by the attorney general, commenced an action in the superior court of San Francisco against the American Sugar Refinery Company, a corporation, to dissolve said corporation, and to recover a penalty, in which, on January 1, 1890, a judgment was rendered in favor of the people dissolving the corporation, and for a penalty or fine of $5,000 and costs. That on February 1, 1890, the plaintiff in said action applied to the court in which said judgment had been rendered for the appointment of a receiver in said action, to take charge of all the property of the defendant corporation. That upon such application a receiver was appointed, who duly qualified and took possession of all the property of the corporation defendant. That the petitioner herein rendered services for the plaintiff in that action in caring for said property while in the custody of said receiver, of the value of $504, which has not been paid; and that on July 7, 1890, petitioner filed his claim for said sum with the state board of examiners of the state of California in the words and figures following:

"State of California,
City and County of San Francisco,—ss.

"P. H. Cahill, being duly sworn, deposes and says: I was employed by the receiver of the American Sugar Refinery Company in that certain action entitled The People of the State of California vs. The American Sugar Refinery Company, a corporation, then pending in the superior court of San Francisco, on the seventeenth day of February, 1890, as

watchman at the American Sugar Refinery, owned by said defendant corporation of this state, then in the hands of a receiver. That I worked from the eighteenth day of February, 1890, up to and including the ninth day of June, 1890, a total of one hundred and thirteen days, at the price of $5 per day, for which said work there is now due me the sum of $504, after deducting all payments made. That the work was faithfully performed in good faith, and that the sum of $504 is now due and owing me.

"P. H. CAHILL.

"Subscribed and sworn to before me this seventh day of June, 1890.

"DANIEL HANLON,
"Notary Public."

That said board of examiners duly examined said claim and approved the same, and attached thereto the following certificate:

"Form No. 126.

"Office of State Board of Examiners.

"Sacramento, ———, 1890.

"The annexed claim for $504, presented by P. H. Cahill for labor, is hereby approved by the state board of examiners for the sum of $504, chargeable to the appropriation for costs and expenses of suits in which the state is a party, in interest, forty-first fiscal year, now exhausted, and, by virtue of the authority conferred upon this board by section 663 of the Political Code, do hereby transmit this claim to the honorable senate and assembly of the state of California, in the twenty-ninth session convened, with this statement of approval, and the recommendation that an appropriation be made to pay the same.

"R. W. WATERMAN,
"Governor.
"W. C. HENDRICKS,
"Secr'y of State.
"G. A. JOHNSON,
"Attorney General, State Board of Examiners."

That on April 6, 1891, the legislature passed an act appropriating money to pay said claim, and others of like

nature, and the money is in the treasury of the state, subject to the payment of said claim. That on May 8, 1891, the petitioner presented said claim, together with the allowance and approval of the state board of examiners aforesaid, and the said act of the legislature, to E. P. Colgan, controller aforesaid, and requested and demanded that he draw his warrant on the treasurer for the same, and that he then refused and still refuses, to draw any warrant for the payment of said claim, or any part thereof.

The answer of the defendant denies that there was any judgment for costs in the suit of the people against the American Sugar Refinery Company; denies that the plaintiff in the last-mentioned action, by its attorneys, or either of them, applied to the superior court for the appointment of a receiver, but admits that a receiver was appointed in said action by the judge of said court; denies that the petitioner Cahill rendered services for the people of the state in said cause, and avers that whatever services he rendered were rendered to the receiver appointed in said cause, and were not worth more than three dollars per day; denies that plaintiff's claim is included with those for which the appropriation was made by the act of the legislature. The answer then avers, substantially, the following affirmative matters: (1) That in the case of Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, the supreme court decided that the appointment of the receiver in People v. American S. R. Co. was null and void. (2) That P. Reddy, the receiver, filed his account in the superior court in the case of People v. American S. R. Co., which accounts were passed upon and allowed by that court, including the item of $504 claimed by the petitioner Cahill, but that such allowance was made without notice to the plaintiff or its attorneys in that action; and that thereafter the plaintiff in that action (the people) appealed to the supreme court from the order settling the accounts of the receiver, and from the order allowing Cahill $504, and that such appeal is now pending; that since said appeal and the passage of the appropriation act of the legislature the board of examiners have refused to allow the claim of Cahill pending said appeal, by reason whereof "the state of California was never liable to said P. H. Cahill or to P. Reddy in the sum of $504, or any other

sum; and therefore the passage of said act for the purpose of compensating said P. H. Cahill is a gift and donation, and in violation of the constitution of the state of California." (3) That the costs incurred by the receiver exceeded $24,000. That the complaint in People v. American S. R. Co. did not pray for the appointment of a receiver or for general relief. That the order to show cause for the appointment of a receiver was issued upon the court's own motion, and counsel in said cause did not have any authority to incur any liability on the part of the state of California, or to make any costs in reference to the appointment of a receiver; and, "for the purposes of a defense to this action and proceeding, this respondent hereby refers to the judgment-roll in the case of People of the State of California v. American Sugar Refinery Company." The answer contains other matters of mere argument and conclusions of law, which need not be stated or considered for the purpose of testing its sufficiency.

1. Did the court err in overruling the respondent's demurrer to the petition? The first ground upon which it is contended that the demurrer should have been sustained is that the petition fails to show that the present state board of examiners has passed or acted upon petitioner's claim, or approved the same. Conceding that this court may judicially know that the members of the board, at the time this proceeding was commenced, were not the same persons who composed it at the time petitioner's claim was approved, it is nevertheless, in contemplation of law, the same board. Counsel have cited no law or case, and I have found none, to the effect that a mere change of the constituent members of the board invalidates acts of the board done before such change, or necessitates a re-enactment of an approval of them after such change, in order to make them effective: See Osterhoudt v. Rigney, 98 N. Y. 222. It is further contended that the petition does not show that petitioner's claim is exempt from the provisions of section 672 of the Political Code, but the contrary. That section of the Political Code forbids the controller to draw his warrant for any claim, "unless it has been approved by the board," or has been exempted from the operation of that section. Since the petition shows that petitioner's claim had been approved by the board, it needed no exemption from the operation of that section to authorize

the controller to draw his warrant for it. This objection to the petition is probably grounded on the assumption that an approval of a claim continued in force only so long as the members of the approving board remain the same, which, as above shown, is unwarranted. It is further claimed that the petition does not identify the claim as one of those for which the appropriation was made. The petition states that petitioner presented his claim to the board of examiners; that the board approved it as a claim chargeable to the state for costs and expenses of a suit in which the state was a party in interest, during the forty-first fiscal year, the appropriation for which was then exhausted; that the board transmitted this claim, with such approval, to the senate and assembly of the ensuing session, and recommended that an appropriation be made to pay the same; that the legislature, at its next session, on the sixth day of April, 1891, in accordance with the recommendation of said board of examiners, did appropriate money "to pay said claim of petitioner, together with other claims of like nature, and that the money is in the treasury of the state, subject to the payment of said claim, and subject to the controller's warrant for the payment of the same." The appropriation act referred to is entitled, "An act making an appropriation to pay the deficiency in the appropriation for costs and expenses of suits in which the state is a party in interest, for the forty-first fiscal year." It appropriates $1,059.40 "out of any money in the state treasury, not otherwise appropriated, to pay the deficiency in the appropriation for costs and expenses of suits in which the state is a party in interest (as approved by the state board of examiners) for the forty-first fiscal year." The second section authorizes the controller to draw his warrant for the amount appropriated and directs the treasurer to pay the same. The act was approved April 6, 1891, and took effect immediately. Reading the petition in connection with the appropriation act, to which it refers, I think it sufficiently identifies the claim as one for which the appropriation was made. Presumably the claim as approved, with the recommendation of the board that the appropriation be made to pay the same, was transmitted to the controller immediately after its approval, as required by section 661 of the Political Code, and remained on file in his office as an approved claim,

for which he was commanded, by the section referred to, to draw his warrant in the order of its number (126), if, as alleged in the petition, there was money in the treasury applicable to its payment. No reason is apparent why the controller should have doubted that petitioner's claim was one of the claims for the payment of which the appropriation was made.

It is further claimed that the petition is defective, in that it does not show that petitioner's services were reasonably worth the sum claimed. No statement of the value of the services, in addition to what appears in the claim approved by the board of examiners, was necessary. Conceding, for the purposes of this case, that the controller may go behind and question the approval of a claim by the board of examiners and the appropriation act of the legislature in certain exceptional cases, this is not one of such cases. Here there is no question as to whether the claim or the approval thereof was fraudulent, or the result of a mistake; nor whether the board had lawful authority to audit the claim; nor whether the act of appropriation was constitutional. The sole question under this head is, Did the board of examiners, in the honest exercise of undoubted authority, err in estimating the value of the services for which the claim was made? As to this question, the decision of the board of examiners was conclusive upon the controller. Section 436 of the Political Code provides: "All warrants for claims which have been audited by the board of examiners, and filed in his office, must be drawn in the order of the numbers placed upon them by that board." Section 661 of the same code: "If the board approve such claim, they must indorse thereon over their signatures, 'Approved for the sum of ——— dollars,' and transmit the same to the office of the controller of state, and the controller must draw his warrant for the amount so approved in favor of the claimant or his assigns, in the order in which the same was approved." It is to be observed, however, that the petition does (unnecessarily) state that "the amount and value of said services was $504." This, taken in connection with the approval of the claim by the board of examiners as set forth in the petition, is mere surplusage, requiring no proof. I think the court did not err in sustaining the demurrer to the answer of the defendant.

2. The answer denies no material fact stated in the petition, and fails to state facts sufficient to constitute a defense to this proceeding. The allegations in the petition that the plaintiff, in the suit of People v. Havemeyer, applied to the superior court for the appointment of a receiver and that there was a judgment for costs in that suit, were immaterial, except as matter of inducement, merely introductory and explanatory of the essential grounds of the proceeding, namely, the approval of petitioner's claim by the board of examiners and the appropriation of money to pay it by the legislature: Gould on Pleading, 42; City v. Lamson, 9 Wall. (U. S.) 478, 17 L. Ed. 725. The validity of neither the approval of the claim by the board nor the act of appropriation by the legislature depended upon the truth of these allegations, and it is at least doubtful whether they were material or relevant matters for consideration by the board of examiners, since the petitioner's claim may have been lawful and just, even though there was no judgment for costs in the suit of People v. Havemeyer, and no application to the court for a receiver therein. But, however this may be, the approval of the claim by the board of examiners and the appropriation of money to pay it by the legislature must be considered conclusive of the validity of petitioner's claim as against the controller, under the pleadings in this proceeding. The board of examiners has unlimited power to investigate the merits of all claims presented for allowance, and may act upon facts within the personal knowledge of its members, as well as upon evidence from other sources: Pol. Code, secs. 658, 666. It was the duty of the attorney general, as a member, to impart to the board his personal knowledge of all material facts in regard to the suit of People v. Havemeyer, which suit had been prosecuted by him; and he must be presumed to have performed this duty. In the matter of approving and rejecting claims against the state, the board of examiners acts judicially, and its decisions in cases of which it has jurisdiction are not subject to collateral attack. In his work on Judgments (section 532), Mr. Black says: "When the statutes commit to a board of county commissioners, or supervisors, or auditors, or to a town council, the duty of examining or auditing claims against the municipality, their action in auditing, adjusting, or rejecting such a claim is judicial in its nature,

and their decision is binding and conclusive, unless reversed on appeal"; citing, among other cases, Osterhoudt v. Rigney, 98 N. Y. 222; Colusa County v. De Jarnett, 55 Cal. 373; Placer Co. v. Campbell (Cal.), 11 Pac. 602. In Ousterhoudt v. Rigney, 98 N. Y. 222, the court said: "The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion, are final and conclusive, and cannot be questioned in a collateral proceeding. Whether the claim is a proper town or county charge, in a case where it is doubtful, and rests upon disputed evidence, and what amount shall be allowed when not fixed by statute, are questions which the statute commits to the determination of the board of audit; and, however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction, and acts in good faith, its audit cannot be overhauled, but is final, as well as to the taxpayers as to the claimant": See, also, Robinson v. Supervisors, 16 Cal. 209; Miller v. Sacramento County, 25 Cal. 94; Emery v. Bradford, 29 Cal. 84; Scheerer v. Edgar, 76 Cal. 569, 18 Pac. 681; Bernal v. Lynch, 36 Cal. 135; Black on Judgments, sec. 250. The affirmative allegations of the answer do not constitute a defense.

What the supreme court decided as to the appointment of a receiver is a matter of law, and therefore not pleadable as a fact. But, conceding, as a matter of law, that the appointment of the receiver was void, it does not necessarily follow that petitioner's claim against the state for services in watching and caring for the property while in the custody of the receiver was not a lawful claim to the extent allowed by the board of examiners, and confirmed by the act of appropriation. For the purpose of sustaining this proceeding it is sufficient to say that the state, as plaintiff in the suit in which the receiver was appointed, may have been responsible for costs and other consequences of the appointment of the receiver, even though such appointment was void, as being in excess of the jurisdiction of the court: Code Civ. Proc., sec. 1038; Adams v. Haskell, 6 Cal. 476; McDermott v. Isbell, 4 Cal. 114; Argenti v. San Francisco, 30 Cal. 467; Lawrence v. Booth, 46 Cal. 187; Beach on Receivers, sec. 313. Granting this, it may be presumed that the board of examiners found a state of facts justifying its conclusion that the petitioner's claim was a proper charge against the state, since its jurisdic-

tion is apparent, and no fraud, collusion, or bad faith is alleged. It is not perceived how the order of the court allowing the receiver's accounts in the suit of People v. Havemeyer, or the alleged appeal from that order, can prejudice or affect the claim of the petitioner in this proceeding, who is not a party to that suit nor to that appeal.

In their reply brief, counsel for appellant make the point that the judgment was taken without any evidence on the part of the petitioner, and is erroneous for this reason. In answer to this it is sufficient to say that it does not appear that the court did not hear evidence, and the presumption is that the court heard whatever evidence was necessary to justify the judgment. The judgment contains the following recital: "And, respondent refusing to amend his answer, and it duly appearing to the court that the prayer of the petitioner should be granted," etc.

The point that the attorney general had no authority to incur any state liability for costs in the matter of the receiver, and therefore that the appropriation by the legislature to pay such costs was a gift, is not sufficiently plausible to merit special consideration, in view of the late decisions in the cases of Stevenson v. Colgan, 91 Cal. 649, 25 Am. St. Rep. 230, 14 L. R. A. 459, 27 Pac. 1089, and Rankin v. Colgan, 92 Cal. 605, 28 Pac. 673. I think the judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

PILSTER v. HIGHTON.

No. 14,510; November 26, 1892.

31 Pac. 580.

Promissory Note.—A Complaint on a Note Alleging its date and execution, and promise to pay ninety days therefrom by defendant maker, and a transfer by indorsement to plaintiff, and nonpayment by defendant, states a sufficient cause of action.

APPEAL from Superior Court, City and County of San Francisco.

Action by Henry Pilster against Henry E. Highton. Judgment for plaintiff. Defendant appeals. Affirmed.

The following is the complaint referred to in the opinion: "The plaintiff complains, and alleges: (1) That on the first day of March, 1890, at San Francisco, state of California, the defendant, by his promissory note, promised to pay to Otto Kloppenburg or order $330.45, with interest, ninety days after date; (2) that the same was, by the indorsement of the said Otto Kloppenburg, transferred to the plaintiff; (3) that the defendant has not paid the same nor any part thereof. Wherefore plaintiff demands judgment against defendant for the sum of $330.45, with interest from March 1, 1890, and for the costs of this action. W. W. McNair, Attorney for plaintiff." Indorsed: "Filed February 7, 1891. Wm. J. Blattner, Clerk. By J. J. Grief, Deputy Clerk."

Walter H. Linforth for appellant; W. W. McNair for respondent.

PER CURIAM.—This is an action upon a promissory note. The complaint was demurred to upon the grounds that it did not state facts sufficient to constitute a cause of action, and was ambiguous and uncertain. The demurrer was overruled, and the defendant given ten days to answer. He declined to answer, and thereupon judgment was entered against him, from which he appeals. The complaint was inartistically drawn, but we think it must be held sufficient. Judgment affirmed.

BERLIN v. FARWELL.

No. 14,467; November 28, 1892.

31 Pac. 527.

Brokers—Compensation—Acting for Both Parties.—Where the evidence shows that plaintiff in an action to recover commissions earned under a contract to find a purchaser for defendant's land was employed by the purchaser without defendant's knowledge to buy the land from defendant at a figure which would suit the purchaser's views, a finding that he was the purchaser's agent was proper, though he had no written agreement with the purchaser for compensation, but was to get his compensation from defendant; and, being the agent of both parties without defendant's knowledge, he cannot recover.[1]

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by C. H. Berlin against Elizabeth Farwell. Judgment for defendant, and plaintiff appeals. Affirmed.

F. A. Berlin and D. M. Smoot for appellant; Haven & Haven for respondent.

FOOTE, C.—This action was brought against the defendant for the purpose of recovering certain commissions alleged to have been earned by the plaintiff in finding a purchaser in the person of Mr. H. D. Bacon for certain lands which Mrs. Farwell had in writing trusted to the plaintiff to sell for her at a certain price. The court below determined the matter adversely to the plaintiff's claim, and from the judgment made and given in the premises this appeal is taken upon the judgment-roll and a bill of exceptions.

The plaintiff and appellant claims that the court below was not justified by the evidence in making the seventh finding of

[1] **Cited** and approved in Burnham City Lumber Co. v. Rannie, 59 Fla. 196, 52 South. 621, which was an action for money had and received, to recover back money taken as commissions for selling plaintiff's land, the plaintiff claiming that the defendant had, without the plaintiff's knowledge and consent, become the agent of the purchaser in the transaction.

facts, and that the conclusions of law are not warranted by the findings. Upon the disposition of these matters the appeal is to be determined. The finding referred to reads thus: "Seventh. That prior to the twenty-second day of September, 1889, and thence to and at the time of the authorization of plaintiff by defendant to sell said land, by writing, signed by her on said twenty-second day of September, 1889, and thence to the time and at the time of the receipt by defendant from plaintiff, on the twenty-fifth day of September, 1889, of said sum of $500 as a deposit by said H. D. Bacon on account of his proposed purchase of said land from defendant, the plaintiff had been and was acting as the agent of said H. D. Bacon in the matter of the proposed purchase by the said H. D. Bacon from the defendant of said land. That in securing from the defendant the said written authorization of sale of date September 22, 1889, the plaintiff was acting at the request and as the agent of said H. D. Bacon; and in the payment to defendant, on the twenty-fifth day of September, 1889, of the sum of $500 on account of said proposed purchase, the plaintiff was acting at the request and as the agent of said H. D. Bacon." The conclusions of law run thus: "That the plaintiff is not entitled to take anything from the defendant by this action, and that the defendant is entitled to recover from the plaintiff her costs." The court below was evidently of the belief, and the facts as found and shown in evidence warrant such belief, that the plaintiff was working in the interests of Mr. Bacon, and was employed by him to do so, although the agent had no written agreement for compensation from Mr. Bacon, but was to get his compensation from Mrs. Farwell; and that the agent was acting in the interests of Mr. Bacon, the proposed purchaser, in endeavoring to get Mrs. Farwell to sell the property at a figure which would meet Mr. Bacon's views, without the knowledge of Mrs. Farwell, from whom he obtained a written agreement for compensation in case he sold the property to Bacon for her. To this extent, at least, the plaintiff was the agent of both parties; and the sole question left for determination is whether, under such state of facts as here exist, the plaintiff can hold the defendant responsible for the commissions claimed in this action. It was said in Kronenberger v. Fricke, 22 Ill. App. 550: "It is a well-established rule of the law

of agency that an agent must not put himself, during the continuance of his agency, in a position which is adverse to that of his principal, for the principal bargains for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exercise of all this in his own favor. . . . . For this reason an agent of the seller cannot become the agent of the purchaser in the same transaction. As a consequence of this rule it is held that a person who attempts to act as the agent of both parties to a transaction, without disclosing such fact to his principals, is precluded from recovering compensation for his services." To much the same effect is a similar matter treated in Carman v. Beach, 63 N. Y. 97. In Farnsworth v. Hemmer, 1 Allen (Mass.), 494, 79 Am. Dec. 756, a broker negotiating an exchange of real estate acted for both parties without informing either that he was employed by the other. It was held that he was not legally entitled to commissions for his services, the court saying: "It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract." We conclude, therefore, that the conclusions of law are proper under all the findings; and, as heretofore stated, the challenged finding being supported by the evidence, it follows that the judgment appealed from should be affirmed, and we so advise.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

CAMERON v. CALBERG.

No. 14,499; November 28, 1892.

31 Pac. 530.

Sale—Change of Possession.—Plaintiff Bought from M. a mare, then pasturing on the land of one W., five miles distant. He went to take possession of the mare, but W. was not at home. On his return he met W., and then arranged with him to remove the mare a few days later, and on the day specified he placed her on another ranch, under an agreement with the manager thereof, who received and held her for plaintiff. Held, that there was a sufficient compliance with Civil Code, section 3440, providing that every transfer of personal property will be deemed to be fraudulent as to creditors, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things transferred.

APPEAL from Superior Court, Alameda County; E. M. Gibson, Judge.

Action by Ashley D. Cameron against G. F. Calberg to recover possession of a mare seized at suit of defendant against plaintiff's vendor. From a judgment for plaintiff, and order denying new trial, defendant appeals. Affirmed.

H. F. Crane for appellant; Wells Whitmore and David Stoddart for respondent.

FOOTE, C.—This action of claim and delivery was instituted to recover possession of a certain mare named "Dolly," claimed to be wrongfully in possession of the defendant. From the judgment rendered in the premises, and from an order denying a new trial, this appeal is taken.

The only point made for a reversal of the judgment and order is that the evidence does not support the findings. In this connection it is urged that the plaintiff, who had bought the property in question from his father in law, Mr. Murr, did not get it in such manner as to satisfy the provisions of section 3440, Civil Code, because, as is claimed, the transfer of the property was not accompanied by an immediate delivery, and followed by an actual and continuous change of possession. As remarked by this court in Byrnes v. Moore, 93 Cal. 393, 29 Pac. 70, "every case of the kind here involved

has its own peculiar features, and must be determined on the particular facts which surround the given transaction or transfer." Many of the facts in this case are similar to those developed in Williams v. Lerch, 56 Cal. 330, where it was held that the transfer was good. Here the vendee got a bill of sale, and paid a sufficient consideration for the property—a mare, which was on a pasture in possession of a third party. The purchaser (the plaintiff here) went to get the mare and other horses he had bought, but did not find the party, Weyland, who had them in charge, at home. On that same day, on plaintiff's return to Oakland, his place of residence, the pasture where the mare was being five miles distant, he met Mr. Weyland, the person who had the mare and the plaintiff's other horses in charge on pasturage, and made arrangements to remove all of them on the 2d of April, 1890, to another ranch for pasturage, a few miles off. The vendor, Murr, in pursuance of one of the conditions of the sale, then paid Weyland for the previous pasturage of the mare and other horses he had sold the vendee. Then, on the 2d of April, 1890—only a few days after this—the plaintiff and a son of the vendor, Murr, and Weyland took the horses that plaintiff had previously owned, the mare in dispute, and other animals bought from the vendor, Murr, and drove them to the Hewston ranch to be pastured. The plaintiff had previously made arrangements with Mr. Harrison, manager of the Hewston ranch, for the pasturage of all the animals above mentioned, and Harrison, in pursuance of that arrangement, received all of the horses, including the mare, from the plaintiff, as the property of the plaintiff, and kept them for him subject to his order, and never heard of, knew, or recognized anyone else in the matter; and Harrison, as manager of the ranch, was in the possession of all the animals for the plaintiff from the 22d of April, 1890, until the 24th of May, 1890, when the mare Dolly was seized at the suit of an attaching creditor of Murr, the vendor, by Calberg, the defendant here, a constable executing the writ. We perceive no error in the action of the court below complained of by appellant, and advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

MUSSER v. GRAY.

No. 14,326; November 28, 1892.

31 Pac. 568.

Judgment — Satisfaction.— M. Held a Judgment Against G., which he agreed to release if G. would deliver him a deed to certain property, which he did. Prior to such agreement, G. had made an assignment of all his property for the benefit of his creditors. M. knew that G. had made an assignment, but denied knowing that it included the specified property. G. made no attempt to conceal any fact. Held, that an order directing the entry of satisfaction of the judgment was proper.[1]

APPEAL from Superior Court, City and County of San Francisco; J. McM. Shafter, Judge.

Motion by E. P. Gray for an order directing the entry of satisfaction of a judgment against him held by J. W. Musser. From a judgment of the superior court of San Francisco county, affirming a judgment granting the order, Musser appeals. Affirmed.

Mich. Mullany and Wm. Grant for appellant; A. Everett Ball for respondent.

TEMPLE, C.—This is an appeal from an order directing the entry of satisfaction of the judgment. The order was made on motion of defendant, on the ground that "said plaintiff has received satisfaction for said judgment, and that said defendant has been duly discharged by the insolvent court from said judgment." The order appealed from does not show upon which of these grounds it is based. It appears that plaintiff recovered a money judgment against defendant, February 18, 1887; that a writ of attachment had been theretofore

[1] **Cited** and approved in Blake v. Farrell, 31 Utah, 113, 86 Pac. 806. In that case one having succeeded in an attachment case "failed, neglected and refused" to credit the fruits of the attachment, so far as they would go, upon the judgment, proceeding rather to collect from the judgment debtor through the processes of the court the whole debt. Upon the debtor's application the court ordered a partial satisfaction.

issued, which had been duly levied upon a certain tract of land claimed by defendant in San Diego county; that after the entry of judgment an execution was issued and levied upon the same land, under which the land was sold to third parties for $37. The further sum of $250 was also collected by the sheriff on said execution, and after deducting his costs he paid to plaintiff's attorney $247.26, properly applicable to the judgment. Nothing more has ever been paid upon the judgment, but in defendant's affidavit, which was one of the papers upon which the motion was based, it is shown that on the 20th of May, 1887, defendant entered into an agreement with plaintiff and one Abbott, who also had a judgment against defendant, for the release and discharge of the judgment, which agreement is as follows:

"In consideration of the delivery to Henry Abbott of a deed to the property of E. P. Gray, situate in San Diego county, state of California, we and each of us hereby agree that we will release the said E. P. Gray from any and all obligations to us or either of us owing, except in so far as his indebtedness to us is secured by virtue of an attachment levied upon the said property of the said E. P. Gray in said San Diego county. It being the intent of this agreement that the said parties hereto shall have the right to enforce their claim against the said Gray in so far as the same relates to the property of the said Gray situate in San Diego county, aforesaid, but to release him from any indebtedness to us remaining after realizing upon the said property.

"Dated May 20, 1887.

(Signed) "J. W. MUSSER.
"HENRY ABBOTT.

"Signed, sealed, and delivered in the presence of
"W. H. CHICKERING."

That the deed mentioned in the agreement, by request of both plaintiff and Abbott, was executed and delivered to W. H. Chickering for them. It is then shown that defendant commenced proceedings to secure his discharge as an insolvent debtor under the laws of this state. Such proceedings were instituted in June, 1888, and a certificate of discharge was issued therein on November 12, 1888. A large portion of the record and of the briefs of counsel are taken up with questions in regard to the insolvency proceedings, but, as the dis-

charge could not justify the action of the court below, the points made in regard to these proceedings need not be considered at length. It does not appear that the claim of plaintiff was proven against the insolvent. Although a creditor loses his debt through such proceedings, that does not make it his duty to surrender and cancel the evidences of his debt, if any he has. On the contrary, the statute expressly makes the order and certificate only prima facie evidence of the release of the debtor from his debts, and allows the creditor two years to discover such fraud as will avoid its effect. Such discharge will perhaps prevent the creditor from getting any benefit from his judgment, but it does not impose upon him the duty of entering a satisfaction of it. Unless it did make it the duty of the plaintiff, the court had no right to force him so to enter it.

The only matter, therefore, to be considered is whether the agreement to accept a deed to the land in San Diego county, and release the debt except as to the reserved right to prosecute the attachment, will justify the order. Upon the hearing of the motion a counter-affidavit made by plaintiff was read. He admits that he signed the release, but charged that it was obtained through fraud; that defendant had become greatly indebted, and on the 6th of December, 1886, executed and delivered to one Henry P. Wood a deed of assignment of all his property, including the San Diego lands, for the benefit of his creditors, and that said Wood ever since has been and now is the owner of said lands for the purposes of the trust; that he did not know when he signed the release that the San Diego lands were included, and that he derived no benefit from, and acquired no rights under, the deed to him; that defendant's brother and attorney, Giles H. Gray, assumed to represent defendant, who immediately after the execution of the deed to Wood absconded; that Giles H. Gray, acting for his brother, continuously gave out, and made it appear and represented to him (affiant), that defendant was the owner of the San Diego lands, and had conveyed them to him (Giles H.), and that he would convey them to said Abbott upon the execution of the release by plaintiff and said Abbott to E. P. Gray; that thus he was led and induced to believe said Giles H. Gray could and would convey to Henry Abbott a good title for the San Diego lands, and that affiant would realize and

One Curran was jointly indicted with one Fitzpatrick for grand larceny. Curran demanded a separate trial and was convicted. From the judgment, and from an order denying his motion for a new trial, he appeals. Reversed.

L. J. Maddux and Eastin & Griffin (W. E. Turner of counsel) for appellant; Attorney General Hart for the people.

PATERSON, J.—The defendant Curran and one Fitzpatrick were charged jointly with the crime of grand larceny. Separate trials were demanded. The defendant Curran was tried and convicted, and from the judgment and an order denying his motion for a new trial he has appealed. We have carefully examined the evidence set forth in the bill of exceptions, and find nothing therein which sustains the verdict. It is not a case of conflict of evidence. The testimony tends to show that Fitzpatrick and another stole twenty-nine sacks of wheat and stored it in a cabin belonging to the defendant Curran. There is not a scintilla of evidence which connects the defendant with Fitzpatrick, or the person who assisted him in stealing the wheat. It is not shown even that he had any acquaintance with either one of them. The wheat was stolen on the evening of the 18th of July, 1891, and placed in the cabin of the defendant. The following is a summary of all the evidence in the case: Watson testified that on July 19th he missed twenty-nine sacks from the pile of grain, and discovered the tracks of a spring-wagon which had been drawn by two mules from Fitzpatrick's place to the stone cabin; that Curran was hauling wheat on the 19th with a four-horse wagon from the Wilson tract adjoining the tract on which the cabin was situated, and that he had been hauling wheat in the same way every day for some time prior to that time. Waterhouse, a deputy sheriff, testified that Curran told him on the 19th, at Salida, that some one had been putting wheat in his cabin, and wanted him to go over and investigate the matter, as there was likely to be trouble. This statement was made before anything was said to Curran by the officer. McGinn, the warehouseman, testified that Curran had brought wheat to his warehouse every morning, and deposited the same in the name of Mary A. Wilson; that on the morning of the 19th he deposited forty sacks in the name of Mrs. Wilson, and that

these forty sacks of wheat were afterward sold and the money paid to Mrs. Wilson; that Curran never brought any wheat of his own there, and that, as soon as he arrived on the morning of the 19th, he told the witness about his discovery of the wheat in the cabin. Jeffries testified that he saw a wagon on the morning of the 19th standing at the door of the cabin with some wheat on it; that he did not see anyone load any wheat on the wagon at the cabin, but did see the defendant picking up wheat in the field near the same. McGinnes testified that he was a deputy constable; that he was told by Curran on the morning of the 19th that a lot of wheat had been placed in his cabin, but he did not know how it got there; that the defendant said to him he noticed wagon tracks leading into the cabin, and there was something wrong, and had driven in there to see what it was, and had discovered the wheat in the cabin. Grider testified that on the night of the 19th he saw two men hauling wheat from the pile to the cabin. He believed these men to be Will Ducker and Sylvester Fitzpatrick. The only testimony in the record which in any way tends to connect the defendant with the commission of any offense is that of Grider, the owner of the threshing outfit which was working in an adjoining field. He stated that early on the morning of the 19th he saw the defendant loading wheat from the cabin upon his wagon. Inasmuch as there is nothing whatever in the evidence tending to show that the defendant ever had any relations with the parties who stole the wheat, or that he even was acquainted with them, the most that can be claimed for this evidence is that it tended to show the defendant had received the wheat knowing it to have been stolen; but that is not the offense charged here. If it should be conceded, however, that the testimony of Grider of itself tended to connect the defendant with the commission of the crime of grand larceny, with which he was charged, we think that the evidence, taken as a whole, is entirely consistent with the innocence of the defendant, and that the verdict cannot stand. It is the duty of the prosecution to make out a case against the defendant. All the circumstances of the case, when taken together, show very clearly that Grider was mistaken in saying that the defendant had taken wheat from the cabin on the morning of the 19th. He was at least half a mile distant from the cabin at the time he claims to have

watched the operations of the defendant. He was contradicted in two material respects by two witnesses, Jeffries and Watson. The latter testified that he saw the defendant drive up to the cabin and stop, but that he did not take any wheat therefrom; that he was working on the Grider machine; that Grider was lying in his bed at the time the defendant was at the cabin; and that he was too far away from the cabin anyway to see what was going on there at that hour in the morning. It is in evidence, uncontradicted, that the defendant had for some time been hauling wheat daily from land surrounding the cabin, and that on the morning of the 19th a portion of his load had been taken from the ground very near the place where the cabin was situated. Several representative citizens of the county of Stanislaus testified that they had known the defendant for several years, and that his reputation for honesty and integrity in the neighborhood where he lived was good—had never before been questioned. A conviction—especially a conviction of felony—ought not to be permitted to stand on mere conjecture. The prosecution is bound to make out a case. It is difficult to see how the jury, under the instructions of the court, could say that they were satisfied beyond a reasonable doubt of the guilt of the defendant, unless there was evidence before them which is not contained in the record before us. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict." Judgment and order reversed.

We concur: Garoutte, J.; Harrison, J.

PIEPER v. PEERS et al.*

No. 14,523; November 29, 1892.

31 Pac. 562.

Appeal Bond.—An Action cannot be Maintained on an Appeal bond given to stay a judgment for the delivery of certain hay, or for $299, the value thereof, the bond being conditioned, under Code of Civil Procedure, section 978, to pay the judgment if the appeal be dismissed, unless it is shown that an execution has been issued since

*For subsequent opinion in bank, see 98 Cal. 42, 32 Pac. 700.

the dismissal of the appeal, or a demand for the property made, or that a delivery thereof cannot be had, since it was necessary that this should appear before the money judgment could be payable.

APPEAL from Superior Court, Santa Clara County; John Reynolds, Judge.

Action by Charles H. Pieper against Alexander Peers and Peter Grimley to recover on a bond given to stay an execution pending appeal, on which bond defendants became sureties. From a judgment for plaintiff, defendants appeal. Reversed.

J. H. Campbell for appellants; W. P. Venor for respondent.

TEMPLE, C.—This is an appeal upon the judgment-roll. Plaintiff's assignor, Marie Albert, obtained a judgment in a justice's court against one Juan Lucas for the delivery of certain hay, or for $299, the value thereof, if delivery could not be had. Lucas appealed to the superior court, and gave a stay bond on which the defendants herein were sureties. The bond was conditioned, as required by section 978 of the Code of Civil Procedure, "that the said appellant will pay the amount of the judgment appealed from, and all costs, and will obey the order of the court made therein, if the appeal be withdrawn or dismissed," etc. The appeal was dismissed by the appellant therein. It is not alleged or found that any execution had been issued, or that since the dismissal of the appeal a demand for the property had been made upon the defendant, or that a delivery thereof could not be had, but simply "that no part of said hay has been delivered pursuant to said judgment, or any part of the judgment for its value, or any part of said costs been paid." The objection is now made that it is not alleged or found that a delivery of the property could not be had, or that any order was made by the superior court which was disobeyed by the appellant in that case; therefore there was no money judgment which the principal was bound to pay, or in fact could have paid. I see no answer to this objection. The judgment was for the delivery of hay. The alternate money judgment was enforceable only in case the property could not be recovered. Until that fact was determined, the money judgment, as an operative, enforce-

able judgment, did not exist. The defendant in the judgment could not secure the privilege of paying the money judgment, rather than deliver the property, by simply taking an appeal. Although, therefore, the undertaking is absolute that the sureties are bound for the payment of the amount of the judgment, it cannot be understood that they undertook that their principal would do something which it was not only not his duty to do, but which he could not have done, unless with the consent of the owner of the judgment. It means that the sureties are bound for the payment of the judgment whenever it becomes payable, when not to pay it would be a failure to perform his obligation on the part of the principal. Whether it would be necessary to have an execution and a return made to the effect that a return of the property cannot be had, is a different question. It should at least be alleged that a return of the property could not be had. I think, therefore, that the judgment should be reversed, and a new trial had.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed, and a new trial ordered. It is further ordered that the court below grant the parties a reasonable time within which to amend their pleadings.

ANGEVINE v. KNOX-GOODRICH.

No. 14,803; November 29, 1892.

31 Pac. 529.

Landlord's Liability for Tenant's Health.—Civil Code, section 1941, requiring the lessor to put buildings intended for human occupation in a condition fit for occupancy, does not create such an implied warranty that a tenement is fit for human occupation as to render the lessor liable to the tenant for injury to his health resulting from a defective sewer, where the lessor had no notice of the defect.[1]

[1] **Cited** and followed in Charlie's Transfer Co. v. Malone, 159 Ala. 336, 48 South. 709. "To put the lessor in default in this respect, pretermitting all other considerations," the court said there, "it is necessary to aver knowledge or notice on her part of such defect."

Cited in the note in 92 Am. St. Rep. 510, 547, on the liability to third persons of lessors of real or personal property.

APPEAL from Superior Court, Santa Clara County.

Action by M. B. Angevine against S. L. Knox-Goodrich. Plaintiff had judgment, and from an order granting a new trial he appeals. Affirmed.

Jackson Hatch and B. F. Bergen for appellant; A. S. Kittredge and Morehouse & Tuttle for respondent.

FOOTE, C.—The plaintiff demanded damages from the defendant for injury to his health, caused by the neglect of the defendant to construct a house with safe and proper sewage pipes and conduits, which house was occupied by the plaintiff as an employee of the lessees of the defendant. Following the verdict of the jury, judgment for $8,500 was rendered in favor of the plaintiff. A motion was made for a new trial upon various grounds, and it was granted, without any specification as to the ground moving the court thereto, The respondent contends that the trial court erred in its rulings upon the demurrer to the complaint, in the admission of evidence, and in the charge to the jury; and in this connection it is urged that the trial court in all these matters took an erroneous view of the force and effect of section 1941 of the Civil Code, in that it was ruled by that tribunal that under such section there was virtually written into every lease of the kind here involved, by operation of the statute, even though not expressed in the lease or a covenant, that the premises leased are habitable, and fit for occupation by human beings, if intended for habitation; and that, as a consequence, if such building or structure is not in such condition, the covenant is broken, and an action for damages such as here instituted will lie. Such evidently was the view taken and expressed by the court in all these matters, and such view is not in harmony with the decisions of the supreme court. It is raised in Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260: "Nor was there any liability arising from section 1941 of the Civil Code, which provides that the lessor of a building intended for the occupation of human beings must put it in a condition for such occupation. In the first place, it is not alleged or found that the building was intended for the occupation of human beings; and, in the second place, it was held in Van Every v.

Ogg, 59 Cal. 566, as we understand the decision, that the obligation imposed upon the landlord by section 1941 'should be limited by the extent of the privilege conferred upon the tenant' by section 1941; and that, therefore, the only consequence of a breach of the landlord's obligation is that the tenant may either vacate the premises, or expend one month's rent toward the repairs, after notice," etc. There is no fraud or deceit on the part of the landlord charged in the complaint, or proved in the case, as we read the transcript. It is a case where the plumbing of the house as constructed was defective, and the illness of the plaintiff was caused by noxious gases that escaped from sewage pipes by reason of this defective plumbing. It is not alleged or proven that the defendant knew anything more about this defect when the lease was made than the plaintiff or his employer, the lessee. But it is sought to make the defendant responsible under the idea that by the Civil Code (section 1941) there is an implied warranty in every lease of a house for the occupancy of human beings that the same is in a habitable condition when leased. This view of the case is not only opposed by the cases we have first cited, but it is in direct conflict with the decision of the appellate court in the case of Green v. Redding, 92 Cal. 548, 28 Pac. 599, where this was said about a somewhat similar contention: "This would be placing the burden of looking out for the health of one's family on the landlord, and leaving the husband and father without any responsibility, therefore, in renting a house for them to live in." If this is the extent of the defendant's responsibility to the tenant, it must be the same with reference to an employee of the tenant, as was the plaintiff here: Willson v. Treadwell, 81 Cal. 59, 22 Pac. 304; Taylor on Landlord and Tenant, 8th ed., p. 198, sec. 175. We therefore conclude that the action of the court below was erroneous as to all the matters alluded to as occurring on the trial of the cause, and for these reasons its action in granting a new trial was founded in justice, and was the exercise of a sound judicial discretion. We therefore advise that the order granting a new trial be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

THOMASON v. DE GREAYER et al.

No. 14,802; November 30, 1892.

31 Pac. 567.

Reformation of Contract.—In an Action to have His Name Inserted as one of the parties to a contract between defendant D. and defendant corporation, plaintiff alleged that his name was omitted through the fraud practiced by D. on the corporation and on plaintiff. Held, that the allegations were insufficient to sustain the action, since no facts constituting the fraud were set up.

Partnership—Breach of Agreement—Remedy.—Where two persons agreed to form a partnership for doing certain work before any contract for doing the work was obtained, and the partnership was never launched, and one of the parties carries on the work alone, the only remedy of the one excluded is an action at law for breach of contract. Powell v. Maguire, 43 Cal. 16, followed.

APPEAL from Superior Court, City and County of San Francisco.

Action by E. R. Thomason against Harry de Greayer and the Ferries and Cliff House Railway Company, a corporation, to reform a contract. From a judgment entered on an order sustaining defendants' separate demurrers to the complaint, plaintiff appeals. Affirmed.

J. C. Bates for appellant; Parker & Eells for respondents.

BELCHER, C.—In July, 1891, the defendant De Greayer entered into a contract with the defendant corporation to pave with basalt stone blocks about five miles of the corporation's track in the city and county of San Francisco. On the 4th of August, 1891, De Greayer commenced doing the work which he had contracted to perform, and continued the same up to September 2d, when the plaintiff commenced this action, asking to have the "contract reformed by inserting his name as one of the contracting parties therein." The defendants demurred separately to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the demurrers were sustained and the action dismissed. The plaintiff appeals from the judgment entered against him.

The demurrers were properly sustained. The facts stated in the complaint were insufficient in several respects.

1. The averments that "said De Greayer, by fraud, deceit, and misrepresentations, omitted to have the plaintiff's name inserted in the contract with said corporation defendant for said work," and "that such omission was done through the fraud, deceit, and trickery practiced by said De Greayer on said corporation defendant and said plaintiff, and by mistake of said corporation," were not sufficient. The rule is that when a party relies upon fraud, either to support his cause of action, or in defense, he must set up the facts which constitute the fraud. "It is a well-established doctrine of equity pleading that a general charge of accident, mistake, or fraud is insufficient, though a plaintiff is not bound to set forth in his complaint all the minute facts constituting the grievance of which he complains. General certainty in these matters may be all that is required, still the facts constituting the fraud, where fraud is relied on as authorizing the interposition of the court, must be charged in the complaint": Kent v. Snyder, 30 Cal. 674; Capuro v. Insurance Co., 39 Cal. 123; and see cases cited on this point in Spring Valley Water Works v. City of San Francisco, 82 Cal. 321, 16 Am. St. Rep. 116, 6 L. R. A. 756, 22 Pac. 910, 1046. Here no facts constituting the alleged fraud were set forth, and the complaint, therefore, failed to state the cause of action.

2. It is alleged that the terms of a copartnership between plaintiff and De Greayer, to do the work of paving, etc., five miles of track for said corporation, were "fully agreed upon" by the parties; but this was before any contract was obtained, and the partnership, therefore, was never "launched." This being so, the rule declared in Powell v. Maguire, 43 Cal. 11, is applicable. It is stated in the syllabus as follows: "When two persons made an agreement to form a partnership, but such partnership was never launched, and one of the parties proceeded to conduct the enterprise in his own name, at his own cost, and for his exclusive benefit, excluding the other, and repudiating the partnership agreement, held, that an action by the latter to establish his right as a partner, and for an accounting, would not lie; his only remedy in such case being an action at law for breach of contract."

The above disposes of the case, and it is not necessary to consider other points. We advise that the judgment be affirmed.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

ROBERTS v. LEVY.

No. 14,990; November 30, 1892.

31 Pac. 570.

Physician—Claim Against Decedent.—There can be no recovery on a complaint against an administrator, alleging that a demand was made for services as an "expert nurse and medical attendant," when in fact the claim presented was for "medical attendance on deceased during his lifetime."

Physician—Absence of License.—A Party cannot Recover for Services rendered as physician and surgeon unless he has a certificate to practice medicine and surgery, as required by statute.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by J. W. Roberts against Eugene W. Levy, administrator, for medical services. Judgment for defendant. Plaintiff appeals. Affirmed.

W. H. H. Hart (Aylett R. Cotton and Nowlin & Fassett of counsel) for appellant; Gunnison & Booth (Walter J. Bartnett of counsel) for respondent.

GAROUTTE, J.—This appeal is prosecuted from a judgment and order denying a motion for a new trial. As appears by the complaint, the action was brought to recover for services rendered by plaintiff as an "expert nurse and surgical and medical attendant" to one Goodwin, now deceased, the respondent being the administrator of his estate. The complaint alleges a presentation and rejection of the claim upon which

the action is founded, and a copy of said claim is thereto attached as a part thereof. The claim is made out and sworn to in the name of Dr. J. W. Roberts, and purports to be for "medical attendance on said deceased during his lifetime," etc. Then follows an itemized statement of the number of visits, the character of services rendered and the charges therefor. As matters of fact the court found the services were rendered by plaintiff as a physician and surgeon, and that at the time of their rendition plaintiff had no certificate to practice medicine and surgery, as is required by the statute, and thereupon rendered judgment for defendant. The complaint is ambiguous and uncertain in this: that the claim presented to the administrator appears to have been for medical services, while the complaint proper alleges a demand for services of an expert nurse and medical and surgical attendant; but no special demurrer was interposed, and the evidence at the trial appears to have been directed to the point as to whether the plaintiff rendered the services in the character of an expert nurse or as a medical practitioner. Viewing the case from either standpoint, the plaintiff must fail to recover If his complaint and evidence is addressed to the theory that he was an "expert nurse and surgical and medical attendant," then his case is not supported by the claim presented to the administrator. If plaintiff stands upon the claim for medical services which was presented to the administrator, then his failure to procure a certificate to practice medicine as required by the statute defeats his right of recovery. This was so decided in Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880. Thus, under either aspect of the case, plaintiff is met with insurmountable difficulties. Various exceptions were taken to the rulings of the court in admitting and rejecting testimony as to the capacity in which plaintiff acted, but, owing to the views already expressed, such exceptions become immaterial. Under the complaint, viewed favorably to plaintiff, he could only recover for medical services, and considering the proof was ample in this regard, still this failure to possess himself of a certificate to practice was fatal to his cause, and his exceptions to the rulings of the court upon other matters are of no benefit to him.

Let the judgment and order be affirmed.

We concur: Paterson, J.; Harrison, J.

JENKINS v. GAMEWELL FIRE ALARM TELEGRAPH COMPANY et al.

No. 14,249; November 30, 1892.

31 Pac. 570.

Judgment by Default—Affidavit to Set Aside.—An affidavit to set aside a judgment by default is not sufficient where it shows that defendants served notice of appearance on plaintiff's attorneys, but does not show that they agreed to extend defendants' time to answer, or that defendants supposed their time had been extended.

Judgment by Default.—An Affidavit of Merits, Stating Facts on information and belief, is insufficient, as being hearsay.[1]

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by A. L. Jenkins against the Gamewell Fire Alarm Telegraph Company and others. From an order setting aside a judgment by default, plaintiff appeals.

Dorn & Dorn and Maxwell & McEnerny for appellant; H. B. M. Miller for respondents.

GAROUTTE, J.—Appeal from an order setting aside a judgment by default, defendants having failed to answer within the time allowed by law. Conceding the facts to be as stated in respondents' affidavit, still no showing of excusable neglect is made. There is nothing in the affidavit to indicate that plaintiff's attorneys either expressly or impliedly agreed to extend defendants' time to answer, or that defendants supposed their time had been extended. In referring to the discretion of the trial court in these matters, it was said in Bailey v. Taaffe, 29 Cal. 424: "The discretion intended, however, is not a capricious or arbitrary discretion but an impartial discretion, guided and controlled in its exercise by fixed legal principles. . . . . If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the

[1] **Cited** and followed in Moody v. Reichow, 38 Wash. 307, 80 Pac. 462, where it is said that "an affidavit of merits must be made by the person having particular knowledge of the facts stated" in it.

error is as much entitled to a reversal in a case like the present as in any other." This is no question of conflict of evidence, but defendants' affidavit, standing alone, fails to reach the mark.

The affidavit of merits is also insufficient. It states that one of the defendants has fully and fairly stated the facts of the case to affiant (defendants' attorney), and he believes that said defendants have a good and substantial defense, etc. Affiant's information as to the facts of the case is purely hearsay. Bailey v. Taaffe, supra, with sound reason holds such an affidavit of no avail.

Let the order be reversed.

We concur: Paterson, J.; Harrison, J.

FRANKE v. FRANKE.

No. 14,532; November 30, 1892.

31 Pac. 571.

Marriage—Proceeding to Annul—Fraud.—Where a man marries a woman whom he has debauched before marriage, and whom he knew to be pregnant at the time of marriage, he cannot have the marriage annulled on the ground that he was deceived by the false assurances of the wife that he was the father of the child, and that she had been chaste to all others, under Civil Code, section 82, providing for annulling marriages where the consent of either party was obtained by fraud.[1]

Marriage—Annulment.—The Fact That the Woman was Pregnant at the time of her marriage is not ground for setting the marriage aside under Civil Code, sections 58, 82, for physical incapacity.

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[1] **Cited** and followed in Gondouin v. Gondouin, 14 Cal. App. 288, 111 Pac. 757, the facts in the two cases being similar.

Cited in Thorne v. Thorne, 57 Wash. 442, 135 Am. St. Rep. 995, 107 Pac. 348, construing a somewhat similar statute of Washington, and holding that if a man, lawfully arrested on process for seduction, marries the woman to procure his discharge, he cannot annul the marriage for duress.

Cited and approved in Lyon v. Lyon, 230 Ill. 372, 82 N. E. 852, 13 L. R. A., N. S., 996. In that case annulment was sought by the husband on the ground that the marriage had been entered into through reliance by the plaintiff on the defendant's assurance, found subsequently to be false, that she had had no epileptic fit for eight years. It was held that there was no fraud here such as would justify annulment.

APPEAL from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Rudolph Franke against Wilhelmine Augusta Franke to annul marriage. From a judgment for plaintiff, defendant appeals. Reversed.

R. M. F. Soto, Carroll Cook and J. E. Foulds for appellant; A. A. Moore and Reed & Nusbaumer for respondent.

VANCLIEF, C.—Action to annul marriage, on the ground that plaintiff's consent to marry was obtained by fraud, and upon the further and distinct ground that the defendant was physically incapable of entering into the marriage state. The cause having been tried by the court, judgment was rendered in favor of plaintiff, from which, and from an order denying her motion for a new trial, the defendant has appealed.

The complaint, after stating the marriage on the fifteenth day of September, 1889, generally and meagerly alleges the cause of action as follows: "(3) For the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented that she was chaste and virtuous, and physically competent to marry plaintiff, and concealed from plaintiff her real condition, claiming then to be pregnant by plaintiff, but chaste and virtuous as to all other men, and that, save plaintiff, she had never had sexual intercourse or connection with any man. All which representations were false and fraudulent. (4) That defendant was not then and there physically competent to marry plaintiff, but was at the time of said marriage pregnant by some other man than plaintiff. (5) That plaintiff relied upon said representations, and was induced to consent to the said marriage by the said representations, and, if the same had not been made, and said concealment practiced, he would have never consented to the said marriage. (6) That upon the discovery of the falsity of the said representations the plaintiff ceased to cohabit with the defendant and has never since cohabited with her." The answer of the defendant specially denies that she made the false and fraudulent representations charged, and denies that she was physically incompetent to marry the plaintiff; admits that she was pregnant by the

plaintiff at and before the marriage, and denies that she was so by any other man, and alleges that before the marriage she fully informed the plaintiff of her true condition.

The court found as follows: "(1) That on the fifteenth day of September, 1889, at the city and county of San Francisco, state of California, plaintiff and defendant intermarried. (2) That on or about the twentieth day of April, 1889, plaintiff and defendant had voluntary sexual intercourse with each other, and that on or about the fourteenth day of August, 1889, and at divers other times in said month before the date of said marriage, defendant and defendant's then attorney, James Herrmann, represented to plaintiff that defendant was pregnant and with child by plaintiff, and that she was chaste and virtuous as to all other men, and that she was physically competent to marry plaintiff. (3) That plaintiff, to satisfy himself of the truth or falsity of these representations, did, before his said marriage with said defendant, act as a careful and prudent man should act, and in all respects used due and proper care. (4) That at and after the making of said representations, and at and after the marriage of said plaintiff and defendant, defendant concealed from plaintiff her true condition. That defendant, at and prior to the making of said representations, and at the time of her marriage with said plaintiff, was pregnant, not by plaintiff, but by a man other than plaintiff. (5) That plaintiff, at and after the time of his marriage with defendant, believed in and relied upon the said representations, and in consequence of said representations and belief plaintiff was deceived into and induced to consent to said marriage; and if said representations had not been made, and said concealment of her true condition practiced by defendant upon plaintiff, plaintiff would not have intermarried with defendant. That the said representations, and each and all of them, were untrue and false and fraudulent, and at the time said representations were made by defendant to plaintiff defendant well knew that they were untrue, false, and fraudulent. (6) That defendant, by reason of the fact that she was pregnant by a man other than plaintiff, was at the time she married plaintiff physically incompetent to marry him, and that her concealment from plaintiff of her true condition was a fraud upon plaintiff. (7) That plaintiff did not discover the fraud which had been

practiced upon him by defendant until on or about the twenty-eighth day of October, 1889, and that immediately upon such discovery he ceased to cohabit with defendant, has never since cohabited with her, and acted promptly and with the highest good faith to procure an annullment of his marriage."

It is claimed by appellant that the evidence is insufficient to justify the findings of fact in several material particulars, and also that the findings do not warrant the judgment. The only evidence of sexual intercourse between the parties before their marriage is the testimony of the plaintiff, which is not fully nor quite fairly represented by the findings, either as to the first time nor the number of times it occurred, or as to the period during which it continued, since these circumstances were material, as we shall see, as bearing upon plaintiff's antenuptial knowledge of defendant's character for chastity. The plaintiff testified that in March, 1889, he was a widower, forty years of age, residing in Oakland, Alameda county, with his family of five children—a son aged fourteen years, a daughter aged eleven years, and three younger children. That the defendant then resided with her parents in San Francisco, and (as appears by other testimony) was only seventeen years of age. That for some time plaintiff had been acquainted with her parents, but had not known the defendant until she came to his house in Oakland, to visit his children, in March, 1889. He did not meet her again until the eighteenth or nineteenth day of April following, when she again visited his children, and remained at his house all night. After playing cards with her and his children until about 9 o'clock that evening, he directed her and his children to retire to bed, which they did, she going to a bedroom with some of the children and he remaining in the sitting-room on a sofa, where he fell asleep. About an hour after defendant had gone to her bedroom she returned to the room where he was sleeping on the sofa, and awoke him by tickling his nose with a feather duster. He then told her "that was dangerous business, and that she had better go to bed and have nothing to do with it." She persisted, however, "fooling around him and playing," and the result was that both went to his bedroom, and there, for the first time, had sexual intercourse, which was repeated the next day about 11 o'clock A. M. Thereafter she visited at his house about once a week, stay-

ing all night and going to his bed. He does not remember how often these visits occurred, but thinks ten or twelve times. They must have continued through the month of May and a part of June. He further testified that on the first occasion he told her he "was afraid of the business," and that she said: "You needn't be afraid; that is all right; I have got my protector" (meaning her beau). As a matter of precaution, however, he used what he called "a protector," to prevent conception, which he seems to have had at hand on the first occasion, but which he says was not successful about the third time it was used, and within the month of April. The use of this instrument is one of the reasons assigned by him for doubting, at the time of the marriage, that he was the father of the child.

On August 22, 1889, the defendant—then Miss Bruhn, and still a minor—by her guardian, Peter F. Bruhn, her father, commenced an action against the plaintiff herein to recover $50,000 damages for seduction, alleged to have been accomplished on the eighteenth day of March, 1889. It appears that plaintiff herein had notice that defendant was pregnant, and claimed that he was the father of the child, before the action for seduction was commenced, but it does not appear by what means he was notified nor that any demand had been made upon him either to marry or pay damages before the commencement of that action. Nor does it appear that he was ever requested by defendant or her parents to marry her. He testified that he called upon her at her father's house a day or two after the action for seduction was commenced and complained that no effort had been made to settle the matter quietly with him before commencing the action, and that she then said she had not advised the action, and that her father had commenced it without her approval. He then told her in the presence of her mother that if he was the father of the child, he was willing to marry her, and "that they had no business to go to law about it." Plaintiff further testified that the defendant first told him that he and no other man was the father of the child at her lawyer's office, on the day they got their marriage license (September 15th), and that her lawyer—Mr. Herrmann—then made her swear to it; and that her lawyer promised that if the time of the birth of the child should not correspond with plaintiff's reckoning, he

(the lawyer) "would get plaintiff free without a cent." It also appears that while the seduction suit was pending the plaintiff therein and her lawyer offered to settle and dismiss the suit for $1,300 if plaintiff was not content to marry. He preferred to marry, though, he said, he always doubted that he was the father, rather than "throw money away" in payment of alleged damages. The child was born October 27th, six months and nine days after the first admitted act of coition, and one month and twelve days after the marriage, and, in the opinion of medical witnesses, had the appearance of a child not prematurely born. These circumstances, with the testimony of plaintiff as to the time of his first intercourse with defendant, must be regarded as sufficient to justify the findings that plaintiff was not the father of the child, and that defendant's representations before marriage that she had been virtuous as to all other men than plaintiff were willfully false. Yet, considering her age and inexperience, she may not have known before marriage that plaintiff was not the father, though for good reasons she may have doubted that he was. But assuming, as we must, that the finding that he was not the father is true, she willfully asserted what she did not know to be true, and what she had good reason to doubt, at least; and to this extent the finding that "she well knew" that her representation that plaintiff was the father "was false and fraudulent" should be qualified. The finding that plaintiff and defendant had sexual intercourse "on or about the twentieth day of April, 1889," should also be qualified and characterized by the circumstances of the intercourse shown by the testimony of the plaintiff; otherwise, material traits and features of the character of that intercourse are hidden from view. The comparative ages and experience of the parties, his relation to her as a visitor of his children at his house, the conduct of both parties on the first occasion, the frequency of the intercourse, the length of time it continued, and the absence of any pretense of virtue on her part while it continued, are material, as tending to show her then apparent character for virtue, the extent to which he was particeps criminis in her incontinence, and that he had not sufficient reason to be deceived by her false representations made to him for the first time on the day he procured the marriage license.

But, accepting the findings as they appear in the record, I think they do not warrant the judgment on the ground of fraud. The Civil Code, section 82, provides that a marriage may be annulled on the ground "that the consent of either party was obtained by fraud." The only case in this state in which a marriage has been annulled on this ground is that of Baker v. Baker, 13 Cal. 88. In that case the defendant (wife) was pregnant by a stranger at the time of marriage, but the husband had no sexual intercourse with her, or any other reason to suspect her chastity, before marriage, and did not know or suspect that she was pregnant at the time of marriage; whereas, in this case the plaintiff participated in the incontinence of his wife before marriage, and also knew her to be pregnant at the time of marriage, and even then doubted, as well he might, that he was the father. Our Civil Code does not define the kind or degree of fraud required to annul a marriage, but no one will contend that every kind and degree of fraud which would be sufficient to annul an ordinary contract would also be sufficient to annul a marriage contract, consent to which had been induced by it. Under these circumstances, it is proper to consult the decisions of the highest courts of other states construing similar statutes: Bishop on Marriage and Divorce, sec. 496. Statutes of other states similar to sections 58 and 82 of our Civil Code, authorizing the nullification of marriage on the ground of fraud simply, without defining the kind or degree of the fraud, have been uniformly construed as being merely jurisdictional, and to mean that kind of fraud defined by the unwritten law applicable to marriage contracts (Bishop on Marriage and Divorce, secs. 475, 478; Foss v. Foss, 12 Allen (Mass.), 26; Scroggins v. Scroggins, 3 Dev. 535); and under such statutes it has been held almost uniformly that where a man marries a woman whom he has debauched before marriage, and whom he knew to be pregnant with child at the time of marriage, the marriage will not be annulled on the ground that he was deceived by the false assurances of the wife before marriage that he was the father of the child, and that she had been chaste with all other men. Having experienced and participated in her incontinence before marriage, he is thereby sufficiently apprised of her want of chastity to deprive him of the right to complain that he was deceived by her false assurances that

he was the only participant in her illicit intercourse: Reynolds v. Reynolds, 3 Allen (Mass.), 609; Foss v. Foss, 12 Allen (Mass.), 26; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Scroggins v. Scroggins, 3 Dev. 535; Long v. Long, 77 N. C. 305, 24 Am. Rep. 449; Carris v. Carris, 24 N. J. Eq. 517; Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376; Varney v. Varney, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. 739; Bishop on Marriage and Divorce, sec. 483 et seq.

The only authority for any exception to the rule, as above stated, which I have been able to find is to be found in the extreme cases of Barden v. Barden, 3 Dev. 548, and Scott v. Shufeldt, 5 Paige Ch. (N. Y.) 43, in each of which the parties were white and the child begotten before marriage was a mulatto. Each of these cases was decided upon the facts stated in the complaint, and upon a demurrer. In the first, Ruffin, J., who delivered the opinion of the court, expressly characterized his concurrence in it as "a concession to the deep-rooted and virtuous prejudices of the community upon the subject." Another distinguishing attribute upon which the exception is said to have been grounded is that "the blood of the woman, as physiologists tell us, has been tainted by mingling with that of the first (mulatto) child, and she is incapable of bearing children that will not show the mixture of African blood": See dissenting opinion of Rodman, J., in Long v. Long, 77 N. C. 304, 24 Am. Rep. 449. In each of those cases the mulatto child had been born before the marriage, but the putative father, in one case, had not seen it, and in the other had not discovered that it was a mulatto until after marriage. In the New York case (Scott v. Shufeldt) the court said: "If the child had not been born at the time of the marriage, the complainant would have had some difficulty in showing that he had been intentionally deceived and defrauded by the defendant, as she might possibly have supposed the child to be his, although she had also had connection with a negro about the same time." Possibly other extremely hard cases may occur sufficiently distinguishable from the cases above cited to justify additional exceptions to the rule, but such cases need not be anticipated, since this case certainly is not one of them.

So far as plaintiff's alleged grievance is founded upon fraud, the substance of it is, according to his own testimony,

that at the mature age of forty years, after a matrimonial experience during which five children were born to him, he was seduced by a girl aged seventeen years—the daughter of a neighbor—while visiting his children at his own house, and therefore virtually under his protection, and whom, indeed, he says, he endeavored to protect from the natural consequence of her indiscretion, so far as he could, in his then helpless condition, by the use of a "protector," which it seems he had prudently provided for such an occasion. Nevertheless she afterward claimed that such natural consequence had not been averted, and brought suit against him for seduction, falsely charging that he was the father of her unborn child, and praying judgment for damages. That, rather than "give money away" in settlement of that suit, he elected to marry her on her assurance that he was the father, and the further assurance of her attorney that if the time of the birth of the child should not correspond with plaintiff's reckoning, the attorney would get him free "without a cent"; though at the time of the marriage he doubted that he was the father of the child, and although by postponing the nuptials two months he might have verified his reckoning. The whole substance of the fraud proved consisted of her false representations that she had been chaste with all other men than plaintiff, which, under the circumstances of this case, partly on grounds of public policy, has been deemed insufficient in degree to warrant the annulment of a marriage. The reasons for the rule are fully set forth in the case above cited.

The finding that defendant was physically incompetent to marry the plaintiff is not justified by the evidence, as there is no evidence tending to prove that she was diseased or defective in physical organization. This ground for annulment of marriage, as expressed in sections 58 and 82 of the Civil Code, is entirely distinct from that of fraud. It consists solely of such physical defect or incurable disease existing at the time of marriage as will prevent sexual coition: Bishop on Marriage and Divorce, secs. 757, 766, 768. The case of Baker v. Baker, 13 Cal. 88, has no bearing whatever upon the question of physical incapacity as a cause for the annulment of a marriage. That was an action for a divorce on the sole ground of fraud, and the judgment of the appellate court was placed upon that ground alone, in accordance with the fifth

subdivision of section 4 of the act of March 25, 1851 (Wood's Dig., 1st ed., p. 491), which section also made "natural impotence, existing at the time of marriage," a cause of divorce; but there was no pretense of such impotence in that case; nor was there any statute in this state, prior to the decision in that case, providing for the annulment of a marriage on the ground of physical incapacity. The case of Baker v. Baker was considered in Carris v. Carris, supra, 24 N. J. Eq. 522, and construed as being consistent with the decision in the latter case. I think the judgment should be reversed and the cause remanded for a new trial.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed.

ASBILL v. STANDLEY, Sheriff.

No. 14,250; December 1, 1892.

31 Pac. 738.

Sale—Change of Possession.—In an Action to Recover certain mares and colts seized on an execution against plaintiff's husband, plaintiff testified that her husband sold her sixteen mares in satisfaction of a debt. The mares were pastured on the husband's land prior to the sale, and were branded with his brand, but at the time of the sale they were brought to the corral, vented with the husband's brand, and then branded with plaintiff's brand. A bill of sale was also given, and they were then turned back on the range where they had been before, and cared for, at seasons requiring care, by men hired and paid by plaintiff. Held, that there was sufficient delivery and change of possession of the property.

Sale—Fraud.—Evidence as to Whether Plaintiff in 1889 gave in to the assessor the ranch as her property could not affect the validity of her purchase of the mares in question in the preceding July, and did not tend to show fraud in the transaction, and was therefore properly excluded.

Verdict—Uncertainty.—A Verdict will not be Set Aside on the ground that it is so uncertain that the judgment thereon cannot be executed, when such objection is presented on the judgment-roll alone, and there is no bill of exceptions presenting the facts sustaining the

contention of the uncertainty of the verdict, and when the answer of defendant sheriff also shows a familiarity with the property referred to in the verdict.

APPEAL from Superior Court, Mendocino County; R. McGarvey, Judge.

Action in replevin by Mary Asbill against J. H. Standley, sheriff, for the recovery of certain mares. From a judgment in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

J. A. Cooper for appellant; J. L. Carothers for respondent.

HAYNES, C.—Appeal by defendant from a judgment rendered against him and from an order denying a new trial. The plaintiffs brought replevin against the defendant for the recovery of certain mares and colts seized by the defendant as sheriff on an attachment issued against the property of the plaintiff's husband. The cause was tried before a jury, and the plaintiff had a verdict and judgment for return of part of the property, or for $1,600, the value thereof, if a delivery thereof could not be had.

We have looked carefully into the questions presented by the record upon the motion for a new trial, and find no error of which the appellant can complain. The instructions to the jury were full and clear, especially those given at the request of the defendant, and, as they do not involve any new principle of law, a discussion of them would serve no useful purpose.

The principal question in the case is the oft-recurring one as to what constitutes "an immediate delivery, and an actual and continued change of possession," and upon this question appellant contends that the evidence does not justify the verdict. The plaintiff gave evidence tending to prove that her husband was indebted to her, and sold her sixteen mares in satisfaction of the debt. These mares were pastured on land of the husband prior to the sale, and were branded with his brand. That at the time of the sale they were brought to the corral, and vented with the husband's brand, and then branded with plaintiff's brand. A bill of sale of the mares was also given. They were then turned back on the range where they had been before, and cared for, at sea-

sons requiring care, by men hired and paid by plaintiff. One of the means provided by statute for designating the ownership of stock, whether horses, cattle, sheep or hogs, is by marks and brands; a mode indeed well calculated to indicate ownership, and which was in common use before the statute was enacted. If the husband's brand had been permitted to remain upon the mares without venting, it, under the circumstances shown, would have been taken as conclusive of his ownership, as in the case of Dean v. Walkenhorst, 64 Cal. 79, 28 Pac. 60, cited by appellant. The plaintiff's brand was different from that of her husband, easily distinguishable from it, and was not only notice of ownership, but almost the only indication of ownership possible in the case of "stock" animals which are not housed or commonly used. In McKee v. Garcelon, 60 Me. 165, 11 Am. Rep. 200, also cited by appellant, the facts were materially different. There the cattle were sold by the husband to the wife. A bill of sale was given, and the cattle remained upon the husband's farm, where both resided, as before, where all the cattle were kept and used. No other act of delivery was made, so far as the report discloses, and we may therefore conclude they were not branded. Here there was not only a bill of sale, but the husband's vent brand was put on, as the statute requires, where branded animals are sold, and the purchaser's brand was also put on. It was properly said in the case last cited that "it is clear that there is the same necessity of a delivery where the parties to the sale are husband and wife that there is in other cases. For this purpose the wife sustains the same relation to the husband as any other person." In the case at bar there can be no question that there was a delivery of the property to the wife. It may have been fraudulent and without consideration, but those questions were submitted to the jury with proper instructions, and from the evidence they found that there was a consideration for the sale, and that it was not fraudulent. The sole question remaining, then, is as to the actual and continued change of possession; and the only ground upon which it could reasonably be claimed that there was not is that they were kept after the sale in the same place they were before. This court has repeatedly held that that is not conclusive. It is a circumstance which the jury may look to in determining that

question, but it must be viewed in the light of other facts attending the transaction. Possession, after the transfer, by either party, is only evidence tending to show ownership, or a change of ownership. A change from the place where the property was kept before the sale may not be as conclusive evidence of a change of ownership as other visible indications upon the property itself, without a change of place; nor can the place where this property was kept by the plaintiff, after the transfer, be said to rebut or weaken the evidence shown by the change of brands, even if it was a place where she would naturally have kept similar property purchased from another. This property carried with it, wherever it might be, "the usual marks and indications of ownership," and were "such as to give evidence to the world of the claims of the new owner."

The evidence upon all points necessary to sustain the verdict was sufficient. The objections to questions put to the plaintiff upon cross-examination were properly sustained. Whether the plaintiff did or did not give in to the assessor in 1889 the ranch as her property could not in any manner affect the validity of her purchase of the mares in question the preceding July, and did not tend to show fraud in that transaction. The latter part of the question assumed what was not shown by the evidence, that she had made an affidavit as to her ownership of the ranch, and for that reason, as well as because it did not relate to nor affect the transaction involved in the litigation, was irrelevant. Nor can we perceive the materiality of the question as to how many sheep and cattle her husband had at the time of her marriage to him in the year 1887.

The only question arising upon the judgment-roll is as to the sufficiency of the description of the property to which the jury found the plaintiff entitled. The verdict is as follows: "We, the jury, find a verdict for the plaintiff, Mrs. Mary Asbill, for the 16 mares bought of F. M. Asbill on the 23d day of June, 1888, with suckling colts, which we value at $675; also 12 two year old mules, valued at $560; also 4 two year old horse colts, valued at $140; also 4 one year old mule colts, valued at $160; also 3 one year old horse colts, valued at $65, the latter being the increase of aforesaid 16 mares,—being a sum total of $1,600 for value of said animals

as a whole." We cannot say that the verdict is so uncertain that the judgment thereon cannot be executed. For aught that appears, the mares that were bought from F. M. Asbill, with their increase, are distinguishable from the other property sued for, and can be delivered by the defendant. All intendments are in support of the judgment, and, as this objection is presented upon the judgment-roll alone, it was incumbent upon the appellant to present by bill of exceptions such facts as would sustain his contention that the verdict is so uncertain that the judgment thereon cannot be executed. We cannot say from its language that such uncertainty exists.

The answer of the defendant affirmatively alleged that "plaintiff claims title to the property described in the complaint, either directly or indirectly, from the said F. M. Asbill, her husband, to herself"; and also alleged "that on or about June 23, 1888, ... all these things being well known to the plaintiff and to the said John B. Asbill, the said F. M. Asbill transferred by bill of sale, without consideration, sixteen head of horses, being part of the property described in the complaint, to the plaintiff herein, and at the same time transferred by bill of sale, without consideration, the remainder of said property described in the complaint to his son, John B. Asbill." The answer further alleged that the remainder of the property was transferred to the plaintiff by John B. Asbill, November 1, 1888. The appellant took all the property under an attachment, and justifies under his writ. His answer shows a familiarity with the property which precludes the idea that he is unable, for want of a sufficient description of the property in the verdict and judgment, to comply therewith; and, unless we can see how the defendant may be prejudiced by the defective description, we are not permitted to reverse the judgment: Code Civ. Proc., sec. 475. The discrepancy between the number of mares sued for and the number awarded plaintiff by the verdict was corrected in the court below, and no question is now made thereon. The judgment and order appealed from should be affirmed.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

TYLER et al. v. DAVIS.

No. 13,551; December 1, 1892.

31 Pac. 1125.

Work and Labor—Sufficiency of Findings.—Where the court found that plaintiff had rendered services worth a stated amount, and that they had been paid a named sum, the finding sufficiently made it appear that only the amount named had been paid, and defendant could not object that it did not support a judgment for the difference.

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by William B. Tyler and another against George O. Davis to recover for legal services performed by plaintiffs for defendant. From a judgment for plaintiffs, defendant appeals. Affirmed.

The answer denied every allegation of the complaint, and set forth two affirmative defenses: (1) That the services alleged to have been rendered were in fact rendered for, and on employment by, one M. H. McDonald, the real party in interest in the cause mentioned in the complaint; (2) that all legal services rendered for defendant by either of the plaintiffs were rendered by plaintiff George W. Tyler, individually, upon a certain contract therein set forth, and that said "plaintiff has been paid in full for all services performed in said cause for defendants." The findings are as follows: "(1) That George O. Davis employed the plaintiff to defend the suit of Smith v. Davis, as alleged in the complaint, which service they accepted and performed, and their services in that behalf were reasonably worth the sum of $1,000; (2) that plaintiff did not make the agreement set forth in the answer of defendant, but plaintiff George W. Tyler was indebted to the firm of Cope & Davis, at the time of their employment, in the sum of $180, and Mrs. M. H. McDonald, as agent for defendant, paid to plaintiffs, since said employment, the sum of four hundred and five ($405) dollars, making in all $585, which is a proper offset against the claim of plaintiffs."

Judgment was rendered in favor of plaintiffs, and against defendant, for $415, principal, and $58.50, costs of suit.

D. H. Whittemore, Wm. H. Sears and James G. Maguire for appellant; John D. Sullivan for respondents.

PER CURIAM.—The findings in this case are, in our opinion, sufficient to support the judgment. The evidence is embodied in a bill of exceptions, and no claim was made by defendant upon the trial that anything more was in fact paid plaintiffs than is found by the court. The finding in regard to the amount paid to plaintiffs is to be construed as a finding that only the sum mentioned therein had been paid. Judgment and order affirmed.

KIRK et al. v. ROBERTS et al.

No. 18,043; December 2, 1892.

31 Pac. 620.

Assignment—Change of Possession.—"Book Accounts and Bills Receivable, including all debts of every kind due [the assignor] from any person," are "things in action," and as such expressly exempt under Civil Code, section 3440, from the statutory rule requiring a valid transfer of personal property to be followed by immediate delivery and change of possession.[1]

Assignment—Change of Possession.—H., Having Transferred by assignment certain book accounts and bills receivable to plaintiff, in part payment of a debt and as security, retained possession thereof as agent to collect the same, and subsequently defendant was appointed his receiver and assignee in insolvency. Held, in an action for moneys collected by defendant on such accounts and notes assigned to plaintiff, where the complaint averred demand on defendant and refusal by him to pay, that it was not necessary to aver or prove nonpayment of plaintiff's claim, such fact being a matter of defense.

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1 **Cited** and approved in Merced Bank v. Price, 9 Cal. App. 187, 98 Pac. 388, where a note and mortgage were held to be, as being "things in action," subjects of lien without change of possession.

Insolvency.—An Assignee in Insolvency Takes the Property of the insolvent subject to all the rights and equities of third persons attached to it in the hands of the insolvent.[1]

APPEAL from Superior Court, Sacramento County; E. A. Bridgford, Judge.

Action by Kirk, Geary & Co. against F. B. Roberts, assignee of Walter R. Hall. Judgment for defendant. Plaintiffs appeal. Reversed.

Johnson, Johnson & Johnson for appellants; H. M. Albery for respondents.

BELCHER, C.—It is alleged in the complaint that on the twenty-third day of April, 1889, one Walter R. Hall was doing business in the town of Colusa, and was indebted to the plaintiffs in a certain large sum of money; that he was the owner of a large amount of book accounts and debts, due him from divers persons, and bills receivable; that on the day named he executed and delivered to the plaintiffs an agreement in writing, a copy of which is set out; that on the first day of August, 1889, he filed in the superior court of Colusa county his petition, schedules, and inventory in insolvency, and was thereupon adjudged to be an insolvent debtor; that defendant was appointed receiver, and afterward assignee, of the estate of the insolvent, and that he duly qualified and entered upon the discharge of his duties as such; that defendant, as such receiver, and assignee, took possession of all the property and estate of the insolvent, including the said book accounts, debts, and bills receivable, and thereafter collected of the money due on such accounts, debts, and bills a sum aggregating $2,000; that before the commencement of this action, and while defendant still retained in his possession the money so collected, plaintiffs demanded of him that he pay the same to them, but he wholly failed, refused and neglected to so pay the same or any part thereof. Where-

[1] **Cited** in Graham Paper Co. v. Pembroke, 124 Cal. 122, 71 Am. St. Rep. 26, 44 L. R. A. 633, 56 Pac. 628, as a case where the defendant was the assignee in insolvency, so that he stood in the shoes of the insolvent; and distinguished from a case where the defendant is a purchaser in good faith and for value, without notice, so that he stands in a better position than the assignor.

fore judgment is asked against the defendant for the sum named, with costs. The written agreement set out reads as follows:

"Whereas, I am this day indebted to the firm of Kirk, Geary & Co., of Sacramento, Cal., in the sum of five thousand four hundred thirty-nine dollars and fifty-nine cents, ($5,439.59,) $4,024.28 being balance due on merchandise account, and $1,415.31 being amount advanced by them to me for the purpose of paying the claims of Redington & Co. and Chas. A. Bayly against me; and whereas, I am desirous of providing for the payment of said indebtedness: Now, therefore, I do hereby agree that I will pay said firm at least two thousand seven hundred and fifty dollars ($2,750.00) within one year (1 yr.) from the date of this indenture, and to that end will make monthly remittances to said firm of as large an amount as I can; and for the purpose of further providing for the payment of said indebtedness, and in partial satisfaction thereof, (i. e., to the extent of the collections and remittances hereinafter referred to), I hereby assign and convey unto said firm of Kirk, Geary & Co. all my book accounts and bills receivable, including all debts of every kind due me from any person; and I hereby agree with the said firm to represent it as its agent henceforth in the collection of said bills and book accounts; and I will reduce the same into cash as speedily as possible, and will remit to said firm the proceeds of such collections as soon as I obtain the money thereon. The whole amount of my indebtedness to said firm shall be fully paid within two years from the date of this agreement, and said indebtedness shall bear interest from date, at the rate of eight per cent per annum, payable quarterly. This indebtedness, however, which is to be secured, further, by a mortgage to be executed by me and W. Y. Gamblin, in favor of said firm, shall be considered due at any and all times during the continuance of this agreement, at the option of said firm, without notice to me.

"In witness whereof I have hereunto set my hand this twenty-third day of April, in the year one thousand eight hundred and eighty-nine.

(Signed) "WALTER R. HALL.

"Witness: ALBERT M. JOHNSON."

A general demurrer to the complaint was interposed and overruled, and the defendant then answered. The answer admitted that defendant as receiver and assignee had collected on the bills and accounts which came into his hands as such the sum of $635.72, but denied that plaintiffs were the owners of the bills or accounts or that defendant was indebted to plaintiffs for the money collected thereon or otherwise. At the trial it was admitted that Hall "duly executed the instrument set out in the complaint, and that, at the time of its execution, he owed the plaintiffs the amount mentioned in said instrument, and that thereafter he filed his petition in insolvency, and that defendant was appointed receiver and elected assignee of his estate as averred in said complaint, and that as receiver and assignee he had collected, and as assignee he holds, retains, and claims, the sums stated in the answer of defendant to have been collected of the book accounts, bills receivable, and debts mentioned in said written instrument; and that plaintiffs had demanded payment thereof, and that the defendant had not paid plaintiffs any part of his said collections." It was also admitted that all the book accounts, bills receivable, and debts due, specified in the said written instrument, were scheduled and specified in the insolvency proceedings of Hall, and that they came into the hands of the defendant as the assignee of Hall. Hall was called as a witness, and testified that he executed the paper set out in the complaint, and that he remained in possession of the book accounts and bills receivable until he filed his petition in insolvency, and then turned them over to defendant. The above was, in substance, all the evidence on which the case was tried and submitted. The court found, among other things, that Hall executed and delivered to plaintiffs the written instrument set out in the complaint, but "did not sell, transfer, or convey the said book accounts, debts due him, or bills receivable, or anything referred to in said written instrument, to said plaintiffs; . . . . that said written instrument was intended and understood by the parties as a written evidence or memorandum of a then existing indebtedness from said Hall to said plaintiffs, intended as an assignment to secure a then existing indebtedness from said Hall to said plaintiffs; that there was no immediate or any delivery from Hall to plaintiffs of the book accounts or

bills receivable, or any thereof, mentioned in said written instrument, nor was there any actual or any change of possession thereof or any portion thereof"; "that at the time said Hall was adjudged an insolvent debtor, as alleged in the complaint, to wit, on the first day of August, A. D. 1889, it is not alleged in the complaint, or shown by the evidence, that Hall was indebted to the said plaintiffs in any sum whatever, nor was he indebted to said plaintiffs in any sum of money at the time this action was commenced"; and "that the complaint in this action does not state facts sufficient to constitute a cause of action." Judgment was accordingly entered that the plaintiffs take nothing by their action. The plaintiffs moved for a new trial, and the appeal is from the order denying their motion.

It is evident that the conclusions of the court were based upon the theory that the plaintiffs could not recover for two reasons: (1) Because the transfer from Hall to them was not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred; and (2) because there was no averment in the complaint, or proof on the part of the plaintiffs, that the indebtedness due from Hall to them had not been paid. We do not think this theory sound. The instrument was clearly intended as an assignment of the accounts, bills and debts mentioned—whether absolutely or as security is immaterial —and, as between the parties, it unquestionably operated to transfer them to plaintiffs, and gave the plaintiffs a right to have the moneys when collected applied to the payment of their debt. The "things transferred" were "things in action," commonly called "choses in action," and were expressly excepted from the operation of the rule declared in section 3440 of the Civil Code. An assignee in insolvency has only such powers as are given him by the insolvent act. He may take into his possession all the estate of the debtor, and may sue in his own name and recover all the estate, debts, and things in action belonging or due to the debtor, and may also have and recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to the provisions of the act, the property so conveyed or transferred: Secs. 21, 55. But unless the transfer is made contrary to the provisions of the insolvent act, and is thus

tainted with fraud, the assignee takes the property of the insolvent, subject to all such rights and equities of third persons as were attached to it in the hands of the insolvent. This is a well-settled rule under the bankrupt act, and we think it equally applicable to our insolvent act: Ex parte Newhall, 2 Story, 360; Mitchell v. Winslow, 2 Story, 631; Yeatman v. Institution, 95 U. S. 764, 24 L. Ed. 589; Hauselt v. Harrison, 105 U. S. 406, 26 L. Ed. 1075. Here there is no pretense that the transfer to the plaintiffs was fraudulent or contrary to any of the provisions of the insolvent act, and hence the fact that there was no immediate delivery nor any actual change of possession of the things transferred did not justify the court in denying to the plaintiffs the relief asked.

The second proposition, that plaintiffs could not recover because they failed to allege or prove that Hall's indebtedness to them had not been paid, was probably based upon the supposed authority of cases holding that a complaint to recover money due on contract is fatally defective unless it avers nonpayment. These cases, however, are not in point here. The complaint did aver demand made upon defendant for the money sought to be recovered, and that he wholly failed and refused to pay the same. We are cited to no case, and we know of none, which holds, in effect, that it was necessary to allege the nonpayment of Hall's indebtedness, and in our opinion such an allegation was not necessary. When one obtains an interest in a chose in action, by indorsement or transfer, the presumption is that that interest was obtained for value, and that it continues in the holder, until the contrary is shown. The point has several times been made that one suing on a promissory note, as maker or indorsee, should allege that he was still the owner and holder of the note, but it has always been held that no such averment was required: Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Hook v. White, 36 Cal. 299. Here, as we have seen, the plaintiffs obtained an interest in the accounts, bills, and debts transferred to them by Hall. The transfer was doubtless made to secure the payment of Hall's indebtedness to them, but if so, no presumption can be indulged that the indebtedness had been paid, and the interest had therefore reverted to the assignor. If such were the fact, it was a matter of defense, and the burden was upon the defendant

to show it. It will be observed that no proof of the payment of Hall's indebtedness was before the court, and therefore the finding that he was not indebted to the plaintiffs in any sum of money at the time this action was commenced was wholly unjustified by the evidence. In our opinion, the order appealed from should be reversed and the cause remanded for a new trial, and we so advise.

We concur: Foote, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded for a new trial.

In re TILLMAN'S ESTATE.

(Appeal of PENEBSKY.)

No. 15,016; December 7, 1892.

31 Pac. 563.

Will Contest—Grounds—Conveyance of Property.—Since Civil Code, section 1292, provides that a written will can only be revoked by a writing or by its destruction, a contest interposed to a petition for the probate of a will, which alleged that the property therein disposed of was, after the execution of the will, conveyed to contestant, presents no ground for contest, where it does not also allege that such conveyance declared the will revoked.[1]

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

To the petition of George W. Wright for the probate of the will of M. E. Tillman, deceased, A. T. Penebsky filed a contest; and from an order sustaining a demurrer to the con-

[1] Cited and followed in In re Hickman's Estate, 101 Cal. 614, 36 Pac. 119, where the court says: "If the will was valid when made, it could be revoked or altered only by a subsequent writing, duly executed, or by obliterating or destroying with intent to revoke."

Cited in the note in 130 Am. St. Rep. 652, on implied revocation of wills.

test, and admitting the will to probate, contestant appeals. Affirmed.

Ash & Mathews for appellant; W. A. Plunkett for respondent.

HAYNES, C.—George W. Wright filed a petition for the probate of the will of the decedent. A. T. Penebsky, the sole heir at law of the testatrix, filed a contest, to which the petitioner demurred. The demurrer was sustained, and the will was probated. This appeal is from the order sustaining the demurrer, and from the judgment admitting the will to probate. The property stated in the petition to have been left by decedent consisted of several parcels of real estate, household property of the value of $50, and $800 cash on deposit in the Hibernia Savings and Loan Society. The will of decedent was dated and made February 13, 1891, and a codicil thereto was made August 3, 1891. The sole ground of contest is that said will and codicil were revoked on the seventh day of August, 1891, and that such revocation was made by a deed executed and delivered by the testatrix on that day to contestant, conveying to him all the real estate mentioned in the will, and by the assignment to him of the bank-book of said deposit, and that conveyance and assignment were absolute and unconditional, and with the intent and purpose of revoking said will, and that the testatrix intended thereby to convey to contestant all her property, both real and personal. The demurrer was properly sustained. The validity of a will is not affected by the subsequent conveyance of property named in and specifically devised thereby, nor is such conveyance affected by the mere fact that a will had been previously executed, disposing of the same property. As a will does not take effect until the death of the party making it, the effect of a subsequent valid conveyance can only be to take the property conveyed out of the operation of the will, leaving it entirely unaffected as to property not conveyed. If the testatrix was not seised or possessed of any property at the time of her death, there could be no object or purpose in proving her will; but even in such case the contestant could not be affected by such proceeding. Here the will, executed shortly before the death of the testatrix, showed a large amount of real estate and some personal property. The con-

testant raises no question except as to a subsequent disposition of that property. Suppose that such conveyance had been obtained by fraud or duress sufficient to render it void, and that question had been raised by the petitioner in response to the grounds of contest, the court in that proceeding could not have tried the issue, not only because it was foreign to the proceeding before the court, but because there was no one to appear for and defend the estate; nor would a finding and judgment against the contestant that the deed under which he claims is void have bound or concluded him, as the court had no authority in this proceeding to determine that question: Corker v. Corker, 87 Cal. 643, 25 Pac. 922. Section 1292 of the Civil Code provides: "Except in the cases in this chapter mentioned, no written will nor any part thereof can be revoked or altered otherwise than (1) by a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; (2) by tearing, destroying, etc., with intent to revoke."

It is not alleged that the deed executed and delivered to the contestant "declared" a revocation of the will, nor is it alleged that it was executed with the formalities with which a will is required to be executed, and therefore it could not be a revocation of the will; it could only take out of the operation of the will the property conveyed, as a will can only operate upon so much of the property as legally and equitably belonged to the testatrix at the time of her death: Bruck v. Tucker, 32 Cal. 426. The assignment of the bank account, as alleged, was insufficient to transfer the household furniture, and it is not alleged that the furniture was a gift to him causa mortis or otherwise. Evidence offered to be given by contestant in support of his grounds of contest was properly excluded. If the court erred in either ruling, it could not prejudice appellant, as the probate of the will could not affect his rights under the deed or assignment. Whether the property passed under the deed or under the will is a question that must be determined in some other proceeding. I advise that the judgment and orders appealed from be affirmed.

We concur: Foote, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

SHERER v. SUPERIOR COURT.

No. 15,232; December 7, 1892.

31 Pac. 565.

Mandamus—Pleading—Presumption.—Where a Petition for a writ of mandate, and the answer of the court, are submitted without evidence, the answer must be taken as true.

Application by Sherer for a writ of mandate commanding the superior court to proceed with the trial of a cause in which petitioner is interested. Application denied.

Spencer & Raker, C. C. McClaskey and Henry N. Clement for petitioner; Shinn & Shinn for respondent.

DE HAVEN, J.—This is an application for a writ of mandate commanding the superior court of Lassen county to proceed with the trial of a certain action alleged in the petition to be pending in that court, and which action it is further alleged that court refuses to set for trial. The petition herein was filed November 4, 1892, and the answer of the judge of the superior court, made thereto, shows that upon September 16, 1892, final judgment in the action referred to in the petition was rendered by the said superior court. This, if true, completely negatives the case made in the petition, and, as the matter was submitted to us without any evidence, and upon the petition and answer alone, the averments of the answer are to be taken as true. Application for writ denied.

We concur: Beatty, C. J.; Harrison, J.; McFarland, J.; Sharpstein, J.

In re BERTON'S ESTATE.

No. 15,035; December 7, 1892.

31 Pac. 576.

Will—Construction — Education of Children.—Testatrix, after leaving a sum of money to each of her two children, a son and a daughter, divided the estate equally between the children and the husband. In case of the death of the husband before the children's majority, his share was to go to the children. The son was to receive his share at the age of twenty-five, and the daughter at twenty, if she married; the children's education "to be paid for out of the interests of my estate." Held, that the charge for education was upon the whole estate, and that, even conceding the legacies to be vested legacies, distribution could not be had until the charge was satisfied.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Bertha Berton, deceased. Flavien Berton, executor, appeals from an order denying his petition for distribution. Affirmed.

Sidney V. Smith for appellant; Napthaly, Friedenrich & Ackerman for respondent.

TEMPLE, C.—This appeal is from an order of the probate court denying the petition of appellant, as executor of the will of the deceased, for a distribution of the estate. The petition was filed at the same time as the account for final settlement of his accounts as executor. Due notice was given, and at the time appointed the final account was approved and settled. Due proof was made of notice to creditors that the time for the presentation of claims had elapsed, and that all claims against the estate, and the expenses of administration, and all taxes levied on the estate, had been paid, and that there was left in the hands of the executor for distribution, $84,450.94. The testatrix left two children—a son and a daughter. The record shows that the son was then, when the final account was settled, nineteen years of age and the daughter over eighteen. The will bears date April 18, 1887. The

executor was appointed May 3, 1888. The final settlement was November 12, 1891. It is said that distribution was refused on the ground that the will had not then been fully executed; that, according to its terms, the estate could not then be distributed. The material portion of the will reads as follows: "I desire to give to my only two beloved children, Michael Albert Tschurr, born in San Francisco, and now residing with my beloved father, Michael Corai, in Zug-Graubunden, Switzerland, and my daughter, Anna Paulina Catharina Tschurr, born and now residing in San Francisco. the summe of ten thousand dollars each, share and share alike; this is to be theyr separate part of my estate, which I give to them. I further give and bequeath the balance of my estate, of which I may die seised or possessed, or to which I shall be entitled at the time of my decease, to my beloved husband, Flavien Berton, of the city and county of San Francisco, my beloved son, Michael Albert Tschurr, and my beloved daughter, Anna Paulina Catharina Tschurr, share and share alike. Each to receive one third of my estate after my two named children will have received theyr ten thousand dollars each. My beloved son shall receive his share of my estate at the time he attains the age of twenty-five years. It is my wish that my only daughter should not mary before she attains the age of twenty years. At that time, if she maries, she to receive all her part of my estate, this to be forever her own separate property outside of five thousand dollars, which shall be her mother's wedding gift. Her husband never to have any right to the balance of her estate, but the interests, her estate to be and remain her own separate property, at the time of her decease to go to her children, or if there are no children, one half to be given to her husband, the other half to her brother or his heirs. Should it please God to call one of my children from this earth before they should be maried or have family, theyr share to go share and share alike to theyr stepfather or brother or sister. It is my will that my children above named, being the children of my dearly beloved husband, Christian Tschurr, deceased, be well educated, theyr education to be paid out of the interests of my estate. My son to choos the proffession he wishes or has talent for. I do nominate, constitute and apoint my beloved husband, Flavien Berton, of the city and county of San

Francisco, to be the executor of this, my last will and testament. I have full confidence that he will do all in his power to promote the wellfare of my two named children, and in this confidence he shall not be obliged to give any bonds whatever. He shall have full power to sell at public or private sale, at such time as he may deem best, all the property, real or personal, of which I may die seised or possessed, and to which I may be entitled at the time of my decease. Should my dear husband, Flavien Berton, be called from this earth before my two children attain theyr majority, his share of my estate to go back to my said two children. Should he remary, he to have only fife thousand dollars of my estate, the balance to go back to my two children, share and share alike. My beloved husband's father, Jean Berton, residing at St. Sorlin Drom, France, I wish in case of our decease to get one hundred dollars yearly for the time of his life, this contribution to be paid out of the interests of my estate and to cease at the time of his decease."

The appellant claims that the bequest to the husband vested at once, and the condition that the property shall go back to the children of the testatrix, in the event of his death before the children reach the age of majority, is a condition subsequent. It is obvious, from a mere reading of the will, that when the property shall be finally distributed under it, many fine and perhaps difficult points can be raised in regard to the effect of some of the language used. As yet the probate court has not construed its provisions further than to say that the estate is not now in a condition to be taken from the executor's hands, and it would hardly be proper to go further here than is necessary to determine that question. To determine that, it does not seem necessary to say whether the legacies are vested or not. Although, if the only provisions of the will bearing upon the question were those discussed by the appellant, the solution of the matter would not be difficult; but there are several other provisions. The language of the first two clauses of the will is the same in regard to the surviving husband and the children, and yet the third paragraph provides that the son shall receive his share when he attains the age of twenty-five years and the daughter when she attains the age of twenty, if she marries. Another clause, further on, provides that her children shall be well educated,

their education to be paid for out of the interests of her estate. There is no provision made for the support of the children before their legacies were to be received by them, unless it is implied in this provision as to their education. Nor is there any express direction or authority given the executor to invest the money belonging to the estate, so that there may be any interest from her estate. Still, it is quite evident that the testatrix intended that the property might be for some time in the hands of the executor. The legacy to the son was not to be received by him until he attained the age of twenty-five years. He must have been about fifteen when the will was executed. It does not appear when she died, but the executor was appointed about one year after the date of the will. She must have contemplated that about ten years might elapse before her son reached the age of twenty-five. No trustee is provided for, except the executor, who becomes such merely as executor. Evidently the charge for the education of the children is upon the whole estate. It would be impracticable, and might defeat the purpose of the charge, to distribute the property subject to the burden. The boy was not to have his share anyway, and there is no express provision for him in the meantime except this. The amount which might be required could not be settled in advance, and it was necessary that it should be promptly and certainly forthcoming. It cannot be held that she meant to leave the education of her children subject to the chance that the necessary contributions could be collected from the distributees, who might become insolvent, or be beyond the jurisdiction of the court. Even conceding that the legacies were all vested, and that payment only was postponed, it seems obvious that the executor should retain possession until this charge is fully satisfied. As it does not appear that this time has yet arrived, I advise that the order be affirmed.

We concur: Foote, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

In re HENSING'S ESTATE.

No. 14,943; December 8, 1892.

31 Pac. 578.

Trustee—Accounting.—In a Probate Proceeding It Appeared that by a decree of distribution made under a will Z. received, in trust for the grandchildren of testatrix, money to be paid when the eldest attained her majority. On the same date as the will the same testatrix conveyed to Z. a lot of land in trust for A., F., and O., grandchildren of testatrix, to be conveyed when the eldest became of age. There were living at date of will and conveyance five grandchildren—M., A., F., G., and A., but no O., as mentioned in the conveyance. After M., the eldest, attained her majority, Z. conveyed the lot held by him in trust to the four grandchildren mentioned in the deed of trust, including O., who never existed, and on the same day deposited in a bank in his own name, as trustee for the five grandchildren, a part of the money held by him in trust, as M., the eldest, desired Z. to retain her share, and the other children had no guardian. Subsequently Z. filed his account, charging himself six per cent interest on the trust fund down to the time of deposit, and seven per cent on the amount retained by him after the deposit, and credited himself out of the whole fund with taxes paid, street assessments, and costs of conveyancing on the lot owned by only three of the grandchildren, and also credited himself with the amount in bank. Held, that Z. should be charged with the amount received by the decree of distribution, with interest at seven per cent until the deposit in the bank, after which time with the interest earned in the bank, and with the amount deposited in the bank. The amount paid by him for taxes, street assessments, and conveyancing should be credited him, and taken out of the shares, distributed to the three grandchildren who own the lot, and in whose interest these sums were expended.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by Manuel Eyre, guardian ad litem, against Herman Zwieg, trustee, in the settlement of the estate of Augusta Hensing, deceased. From a decree in favor of plaintiff, defendant appeals. Reversed.

A. H. Loughborough for appellant; Manuel Eyre for appellee.

FOOTE, C.—Under the terms of a will made by Augusta Hensing, dated August 14, 1876, a decree of distribution was made by the probate court of San Francisco, December 19, 1879, distributing the sum of $806.19 to Herman Zwieg, in trust to invest the same, and pay the income of the same to Anna Louise Hinden, the daughter of the testatrix, during the lifetime of one Valentine Hinden, the husband of Anna Louise Hinden, and upon the death of the husband to pay the principal of that sum to Anna Louise Hinden; but, in the event that she did not survive her husband, the money bequeathed in trust should be invested by the trustee, Zwieg, for the use and benefit of the surviving children of Anna Louise Hinden by her said husband, Valentine, and that the income, or so much thereof as should be necessary, should be expended for the support and education of the children until the oldest should attain the age of majority, and that then the money bequeathed, or so much thereof as should remain, should be equally divided between the children or such of them as might survive. At the same date as the will, the same testatrix conveyed a lot of ground to Zwieg, in trust for Margaret, Alfred, Minna, and Otto Hinden, grandchildren of the grantor in the deed, and upon trust to convey the same to them on the 25th of September, 1889, that being the day after the day when Margaret, the oldest of these grandchildren, should attain the age of majority. Anna Louise Hinden died in January, 1881, leaving her husband Valentine Hinden, surviving, and five children, called Margaret, Alfred, Minna, Camille, and Alice, all of whom were born prior to the execution of the deed in trust and the making of the will. There never was any child named Otto Hinden, and therefore the deed in trust of the lot was for the benefit of the three children mentioned in it, viz., Margaret, Minna, and Alfred, leaving out Camille and Alice, as is claimed, by some mistake. The will mentioned none of the children by name, nor did the decree of distribution, so that under that decree the five children born before the making of the will, viz., Margaret, Alfred, Camille, Alice, and Minna, took equally of the fund distributed. Under the deed, however, only three of them had an interest in the lot, viz., Margaret, Alfred, and Minna. Zwieg, the trustee, the fund being small, and he acting in good faith, used the money himself, and paid the interest, at six per cent per annum, to

Mrs. Hinden as long as she lived, and afterward expended a small part of the interest on the expenses of the children. He also paid taxes on the lot conveyed to him for the benefit of three of the children amounting to $49.70, and a street assessment amounting to $208.28, certain costs of conveyance, etc., amounting to $10, or thereabouts. Upon the 5th of October, 1889, he deposited a portion of the money—$1,100—in a savings bank of good repute, in his name, as trustee for all the five children, and on that day he executed a deed to the children, including Otto, who never existed (the conveyancer following the terms of the deed from the original grantor in the deed of trust). Thus the deed made vested the title to the lot in Margaret, Alfred, and Minna, leaving out Alice and Camille, of the five children interested in the fund included in the decree of distribution. According to the terms of both trusts, the trustee was required to pay over the money to the five children, and execute the conveyance to the three children, on the 25th of September, 1889. But it is claimed that Margaret, who was then of age, asked that he retain her share of the money, and the other children had no guardian. Zwieg was cited on the 15th of April, 1891, under section 1699 of the Code of Civil Procedure (Stats. 1889, p. 337), by a petition of the minors, by Manuel Eyre, guardian ad litem, to appear and render an account. He filed his account, and charged himself interest on the fund in hand at seven per cent per annum, semi-annually, and claimed no commissions or counsel fees. He claimed credit, as against the whole fund, for the taxes, assessments, and conveyancing fees, etc., in respect to the lot, which was, however, owned by only three of the children, and also for the amount in bank. The court sustained the objection to the disbursements for taxes, assessments, and costs of conveyance, etc., and gave no credit for the amount deposited in bank, and charged the appellant here, Zwieg, with the original sum of $806.19, with interest at the rate of seven per cent per annum, compounding semi-annually, to the date of the order in this cause, made August 14, 1891, we suppose because in his account the trustee had charged himself with interest at that rate, as being perhaps profit realized by him out of the money.

As we view the matter, the court, in allowing this account, should have charged Zwieg with the money received under the decree, with interest at seven per cent per annum, with semi-annual rests, under the rule he had prescribed for himself, up to the date when the $1,100 was put in a savings bank; for after that he was responsible for interest on that sum up to August 14, 1891, only to the amount earned from the bank, but he also remained responsible for the $1,100. Of course, the sums paid Mrs. Hinden in her lifetime, and for the children's expenses, should be deducted, as they were. But we do not think the trustee should be disallowed entirely the moneys he paid out for taxes, assessments and conveyances respecting the lot of the three children. One-third of these sums should be deducted from each of their shares of the money to be distributed to them, and not be a charge upon the portions of the other two children, not named in the deed to the lot. Therefore, the trustee should receive credit for those sums as against the shares of the three children who own the lot, as he paid these sums out to protect their interests. For these reasons the decree made in the premises should be reversed, and the court below directed to enter a decree in accordance with the views here expressed, and we so advise.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the decree is reversed, and the court below is directed to enter a decree in accordance with the views herein expressed.

In re BULLARD'S ESTATE.

No. 14,902; December 8, 1892.

31 Pac. 1119.

Probate Practice—Filing Additional Findings.—Code of Civil Procedure, section 1704, provides that all orders and decrees of the court, or the judge thereof, in probate proceedings, "must be entered at length in the minute-book of the court." Held, that after an order was entered from which an appeal was taken, and while it was pend-

ing, the trial court had no power to make any new or further findings or decree in regard to the matters involved.[1]

Probate Practice.—Findings of Facts will not be Set Aside because they are intermixed with statements of evidence, argument, and conclusions of law.

Probate Practice.—The Sufficiency of a Bill of Contest in a probate proceeding will not be considered by the supreme court when it is raised for the first time on appeal.

APPEAL from Superior Court, City and County of San Francisco; E. R. Garber, Judge.

Proceeding to contest the will of James H. Bullard, deceased. From an order in favor of contestants, the beneficiary appeals. Affirmed.

George D. Collins for appellant; Eugene N. Deuprey for respondents.

BELCHER, C.—This is an appeal from an order refusing to admit a proposed will to probate. The testator, James H. Bullard, died at the age of about seventy-six years, leaving, surviving him, three grown-up sons. His estate consisted of real property in the city and county of San Francisco of the alleged value of $6,000. Eight days before his death he executed the will in question, and by it devised all of his estate to his eldest son, except a nominal legacy of five dollars to each of the other two. The eldest son presented the will for probate, and his brothers contested it upon the grounds, first, that the alleged will offered for probate is not and was not the last will, or any will, of James H. Bullard, deceased; second, "that said James H. Bullard, at the alleged time of the pretended making and execution of said pretended will, was not of sound and disposing mind"; third, that the testator, if he made the pretended will at all, was induced by the proponent and his wife to sign it by and through fraud and undue influence. The proponent answered, denying "that, at the time of the making or execution of said will, said James H. Bullard was not of sound or disposing mind," and also denying specifically each of the other grounds of contest.

[1] **Cited** in the note in 31 L. R. A., N. S., 208, on power of trial court to correct its record after an appeal or writ of error.

The case was tried by the court without a jury, and on August 19, 1891, a paper was filed by the clerk, which, as appears from the transcript, was signed by the judge, and had at its head the title of the court and cause, and the word "Findings," and was indorsed, "Opinion and findings denying probate of will." In this paper, after a somewhat lengthy statement of the evidence, the facts, and the law bearing upon the question of the testator's mental capacity to make a will, is found the following: "The case made by the contestants upon this issue has not been met or overcome by the defendant. It is probable that the testator was sometimes able to recognize those about him, both before and after the execution of the will, and it may have been that at times he was able to converse and to make known his wants; but it does not necessarily follow that, because of his ability to do these things, that he was of sound and disposing mind. If such a presumption arises, it is overthrown by the facts developed here. It is the case of a very old man whose vital forces were fast ebbing away, brought down to his deathbed by old age, with body and mind alike upon the eve of dissolution, and while sore with sickness, and weak with infirmities, without strength or energy, the hopeless victim of death, called upon in this condition to dispose of his property by a will prepared without his knowledge, and presented in the persuading presence of those to whom obedience, in his helpless illness, had become a habit. I find that he was not of sound and disposing mind." Then, after speaking briefly of the question of undue influence, it is said: "The other grounds of contest do not require special consideration here. I find against them. But it follows from the finding of the mental incapacity of the testator that the proposed will must be denied probate, and it is so ordered." On the day this paper was filed, a minute order was entered by the clerk "that the proposed will herein be, and the same is hereby, denied probate, from the finding of the mental incapacity of the testator herein." From this order an appeal was duly taken by the proponent of the will on October 5, 1891, and the transcript was filed in this court on December 23d following. On March 8, 1892, an order in the case was made by the trial court, reading as follows: "The application on behalf of contestants to alleged will of James H. Bullard, deceased, to have

findings and decree regularly submitted to this court by counsel for contestant signed as the proper and only finding and decree herein, coming on to be heard on the 8th day of March, 1892, after due notice, etc.: Now, the court signs and makes the findings and decree signed this 8th day of March, 1892, the only proper or any findings and decree in the above-entitled matter; and this court now orders, adjudges, and decrees hereby that the paper filed herein August 19, 1891, and indorsed in the handwriting of the court herein 'Opinion,' is not, and at no time was, in any respect, findings, and such paper was not intended in any wise to be used or construed as findings herein, and that the words, 'and findings denying probate of will,' indorsed thereon, was the act of the clerk in the county clerk's office of this court, and without right or authority, and in no wise was the act of this court; and it is hereby ordered that said paper, filed August 19, 1891, is not, and at no time was, a part of the judgment-roll herein, and that the order made upon said paper filed August 19, 1891, and all proceedings thereon, be, and the same are hereby, vacated and set aside." The order thus made, and the findings and decree signed and filed, have been brought here on suggestion of the diminution of the record.

The respondents contend that "the appeal taken herein is void, being based upon false findings, and a false and bogus minute order, and that there is not any appeal taken from the findings and decree of the court, namely, the findings and decree of March 8, 1892," and, therefore, that "the so-called 'appeal' taken by the appellant herein should be forthwith dismissed." The appellant, on the other hand, contends that the order of August 19th—it having been entered at length in the minute-book of the court as required by section 1704 of the Code of Civil Procedure—would have become final and conclusive against him if no appeal had been taken therefrom within sixty days after it was entered, and that after the appeal was taken, and while it was pending, the trial court had no power to make any new or further findings or decree in regard to the matters involved. This contention seems to be well supported by the authorities, and in our opinion it must be sustained: Livermore v. Campbell, 52 Cal. 77; Baggs v. Smith, 53 Cal. 88; People v. Center, 54 Cal. 236; Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480; San Francisco Savings

Union v. Myers, 72 Cal. 161, 13 Pac. 403. It follows that the findings and decree of March 8th were made without authority, and must therefore be disregarded. The appeal cannot be dismissed.

The question then is, Can the order of August 19th be sustained? Appellant contends that it should be reversed, upon the grounds (1) that there were no sufficient findings to support it; and (2) that the bill of contest did not state facts sufficient to support the ground of contest on which the order was made, to wit, that of mental incapacity.

The first ground is based upon the statement that the paper found in the record, and designated "Findings," contains a heterogeneous mass of argument, opinion, probative facts, and conclusions of law, but no findings of the ultimate facts; and it is said that "apparently the statement, 'I find that he was not of sound and disposing mind,' is the finding of an ultimate fact, but, when taken in connection with the other portions of the findings, it will at once be perceived that it is but the court's conclusion from the application of the law, as understood by it, to the other facts found, and therefore must be considered a conclusion of law." In support of this position, McClory v. McClory, 38 Cal. 575, and Walker v. Buffandeau, 63 Cal. 316, are cited. In the first case cited it was held that "a document filed by the judge, in which he states the case, the testimony, and the reasons for his decision, and not the ultimate facts established by the evidence, is an opinion, and not a finding, within the meaning of the code." And in the second case the court, after referring to Jones v. Clark, 42 Cal. 180, said: "But unless the previous findings, in some degree, tend to prove the ultimate fact, it is manifest that the conclusion [as in this case] 'from the foregoing facts' must be treated as what it purports to be—a conclusion of law from the facts previously recited." In Jones v. Clark the question was as to ratification of a promissory note purporting to have been executed for and on behalf of a mining partnership, and signed by the superintendent as such, and on page 192 it is said: "The court finds several facts which, in the opinion of the court, tend to establish the fact of ratification, and then finds, as a conclusion from them, that the note has been fully ratified and confirmed by the company. This was the ultimate fact to be ascertained, and it is none the

less a finding of fact because it is stated as a conclusion from other stated facts." We fail to see how these cases support the contention of appellant. It is true, as stated in Hidden v. Jordan, 28 Cal. 306, that findings "should consist of a concise, distinct, pointed, and separate statement of each specific, essential fact established by the evidence, in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found." But, if the ultimate facts are found, they will not be set aside or disregarded because they are intermixed with statements of the evidence, findings or probative facts, argument, and conclusions of law. Here one of the ultimate facts to be determined was as to the mental capacity of the testator to make a will; and in our opinion the finding "that he was not of sound and disposing mind" must be treated as a finding of the ultimate fact, and not as a conclusion of law. This seems clear, for the reason, in the first place, that it purports to be such a finding, and, in the second place, that the previous findings tend, at least in some degree, to establish the fact that he was not of sound and disposing mind.

But, conceding the finding in question to be a finding of fact, it is next claimed that "it is clearly insufficient, because too general and indefinite, as it is not confined, or at all directed, to the mental capacity of the decedent at the very time when the will was executed." We do not think this point can be sustained. Looking at all the findings, it seems clear that the finding objected to was intended to refer, and must be understood to refer, to the time when the will was executed.

The second ground relied upon by the appellant for a reversal of the order relates to the bill of contest, and it is claimed that it is wholly insufficient, because it charges only that the testator was not of sound and disposing mind "at the alleged time of the pretended making and execution of said pretended will." It is urged that the "alleged time" of the execution might not be the true time, and that the time of the "pretended" execution of a will is absolutely irrelevant, and that a "pretended will" is one that is offered as something false or unreal; and it is said the code provides that "any person interested may appear and contest the will,"

but says nothing about contesting a pretended will. It is therefore claimed that the bill of contest was insufficient to support the order, and hence it should be reversed. The part of the bill of contest here objected to was not happily written, and, if the proponent had demurred to it on the ground that it was ambiguous or uncertain, very likely his demurrer would have been sustained. No demurrer, however, was interposed, and the question is raised here for the first time. We think it should have been raised in the court below by special demurrer, and, not having been, that it cannot be raised here. It results, in our opinion, that the order appealed from should be affirmed.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

POTTKAMP v. BUSS et al.

No. 14,448; December 8, 1892.

31 Pac. 1121.

Deed—Property Conveyed—"Store."—The Recital in an instrument of sale that there was conveyed "that certain store, and all the stock and goods therein, and the bakery attached thereto, and the tools and fixtures of said bakery," will be construed as conveying the land on which the store and the bakery attachment stand, and so much as may be necessary for their ordinary use.

APPEAL from Superior Court, City and County of San Francisco; F. W. Lawler, Judge.

Action by Adolph Pottkamp against John G. Buss and others to quiet title to land. From a judgment for defendants and from an order denying his motion for a new trial, plaintiff appeals. Reversed.

A. B. Hunt and A. D. Lemon for appellant; F. J. Castlehun, John F. Burris and M. G. Cobb for respondents.

VANCLIEF, C.—Action to quiet title to a lot of land fifty by one hundred feet, and a house thereon, used and occupied as a store and bakery, situate in the city of San Francisco. The defendants answered the complaint, denying plaintiff's alleged title, and averring that Buss is the absolute owner of the house and lot, and that the defendants Pfeiffer & Ludemann (sued as Doe and Roe) are in possession under a lease from him. Defendants also filed what purports to be their cross-complaint against the plaintiff, praying that their title may be quieted, and that plaintiff "be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the defendants." Judgment passed for defendants, according to the prayer of their cross-complaint. The plaintiff brings this appeal from an order denying his motion for a new trial.

The plaintiff claims title from the defendant Buss by the following written instrument:

"John G. Buss to Adolph Pottkamp.

"Know all men by these presents, that I, John G. Buss, of the city and county of San Francisco, for and in consideration of $2,500, the receipt whereof is hereby acknowledged, do hereby sell, convey, and transfer to Adolph Pottkamp that certain store, and all the stock and goods therein, and the bakery attached thereto, and the tools and fixtures of said bakery, situate at the southeast corner of Seventeenth and Dolores streets, in the city and county of San Francisco, state of California; also 8 horses, 3 wagons, and 1 buggy, with the harness belonging to all and each of said wagons and buggy.

"In witness whereof, I have hereunto set my hand and seal this 31st day of March, 1887.

"[L. S.] JOHN G. BUSS.

"Witness: JOHN R. KELLY."

On July 8, 1887, Buss filed in the superior court his petition under the insolvent act, and was then adjudged to be an insolvent debtor. On July 20, 1887, he applied to the court in the insolvency proceedings to have set apart to him the house and lot in question here as a homestead, and his application was granted. A certified copy of the order setting

apart the homestead was recorded on July 23, 1887. The assignee in the insolvency proceeding, however, claimed all the property described in the instrument dated March 31, 1887, above set out. But a compromise was effected between the plaintiff and said assignee by which the latter released to the former the house and lot in question, and the plaintiff released to the assignee all his right to the personal property described in said instrument. The court construed the instrument of March 31, 1887, to be a mere bill of sale of the personal property therein described, and as not intended to convey the premises described in the complaint. I think this was error. There is nothing in the circumstances under which the instrument was executed tending to justify this construction; and it seems to have been given solely upon the ground that the word "store," as used in the instrument, does not mean the house and lot, but only the personal property stored therein. The language of the instrument is: "That certain store, and all the stock and goods therein, and the bakery attached thereto, and the tools and fixtures of said bakery." This very clearly expresses the intention to convey the building in which the goods were stored, and the attachment thereto, in which the business of baking was carried on: See Webster's definition of the word "store"; also, Barth v. State, 18 Conn. 440, and State v. Canney, 19 N. H. 137. The conveyance of the storehouse and the bakery attachment thereto included the land on which they stand, and so much as may be necessary for their ordinary use: Devlin on Deeds, sec. 863, and authorities there cited. The evidence tended to prove that the instrument was intended as security for a debt due from Buss to plaintiff; but, had the court so found, the finding would not have justified the judgment, even though the debt secured had been subject to a plea of the statute of limitations: Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74. If the instrument is an unsatisfied mortgage, that fact, with an offer to redeem from it, might perhaps have constituted sufficient ground for defendant's cross-complaint praying that his title be quieted against the plaintiff. But the record does not present this question, and it need not be decided. The judgment rendered was based on the ground that the instrument, whether a mortgage or an absolute deed, affected only

the personal property; and, there being no issue as to the personal property, there was no occasion to consider whether the instrument was a mortgage of the personal property or not. I think the order should be reversed and the cause remanded for a new trial, with leave to the parties to amend their pleadings.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is reversed and the cause remanded for a new trial, with leave to the parties to amend their pleadings.

KENNEDY & SHAW LUMBER COMPANY v. TAYLOR et al.

No. 14,182; December 8, 1892.

31 Pac. 1122.

Partnership—Assuming Antecedent Debts of Members.—Civil Code, section 2395, provides that "a partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." Held, that a partnership was formed where a contractor, on assigning his contract to others, made a written agreement with them, which agreement provided that the contractor was to do the work, that the parties taking the contract were to furnish the money to carry it on, and receive the payments made as the work progressed, but that the profits were to be equally divided between them.

Partnership.—Material was Sold and Delivered to the contractor before the agreement of partnership was made, and was afterward used in the work. Held, that a finding that the partnership assumed payment thereof was justified.

APPEAL from Superior Court, City and County of San Francisco; E. R. Garber, Judge.

Action by the Kennedy & Shaw Lumber Company against Joseph W. Taylor, W. S. Somervell and E. Lund, as co-partners, for the recovery of money. From a judgment for

plaintiff, and from an order denying their motion for a new trial, defendants Taylor and Somervell appeal. Affirmed.

J. C. Bates for appellants; Langhorne & Miller for respondent.

VANCLIEF, C.—This is an action to recover from the defendants, as copartners, the sum of $1,815.59 for lumber sold and delivered to them by plaintiff. The defendant Lund failed to answer, and his default was entered. The other defendants answered, denying all material allegations of the complaint. The cause was tried by the court, and a joint judgment was rendered against all the defendants. The defendants Taylor and Somervell appeal from the judgment, and from an order denying their motion for a new trial.

The principal point made by appellants is that the finding by the court that the defendants were copartners is not justified by the evidence. On June 18, 1889, the defendant Lund entered into a written agreement with Antonelle and Doe, whereby he agreed to do certain work on section 8 of the seawall along the waterfront of San Francisco, and to furnish all materials therefor, and to purchase the lumber needed for the performance of the agreement on his part from the plaintiff. The defendants Taylor and Somervell executed to Antonelle and Doe their bond, guaranteeing that Lund would perform his contract. On June 20, 1889, Lund assigned his agreement with Antonelle and Doe to Taylor and Somervell, and at the same time the following written agreement was executed between Lund, Taylor and Somervell:

"This agreement, made and entered into by and between Jos. W. Taylor and W. S. Somervell, parties of the first part, and E. Lund, party of the second part, all of the city and county of San Francisco, state of California, witnesseth: The parties of the first part agree to furnish, as required, all moneys necessary to fulfill and carry out all the conditions of that certain contract and agreement made and entered into by and between Antonelle and Doe and E. Lund (party of the second part therein), dated June 18, 1889. For such moneys so advanced and paid, the party of the second part, E. Lund, is to give his whole time and energy to the successfully carrying on and completing of the afore-

said contract in every particular. The parties of the first part, J. W. Taylor and W. S. Somervell, shall collect all moneys due and owing, or to become due and owing, on account of such contract, pay all bills as presented, and keep or have kept a faithful book of records showing receipts and disbursements, where any and all parties to this agreement shall have free access to review the same at all reasonable times, and make such notes as he may desire therefrom; and, after all just and equitable bills are fully paid and satisfied, the remainder of any moneys remaining as a profit on such contract is to be and shall be divided between the parties hereto equally, share and share alike.

"Witness our hands and seals this 21st day of June, A. D. 1889.

"J. W. TAYLOR.
"W. S. SOMERVELL.
"E. LUND."

Though this agreement is dated June 21st, the court found that it was executed on June 20th, and the evidence justifies this finding. The evidence shows without conflict that this agreement was executed at the same time that Lund assigned his contract with Antonelle and Doe to Taylor and Somervell, which assignment was acknowledged before a notary public, whose certificate is dated June 20th. The evidence further shows that Taylor and Somervell received the installments paid on the contract as the work progressed, and paid the laborers and many other expenses, but failed to pay plaintiff for the lumber delivered mostly on the orders of Lund, but a part of it on their orders.

I think the agreement above set out, and the acts of the parties under it, sufficiently evince a partnership to justify the finding in question: Civ. Code, sec. 2395. The only evidence claimed to be opposed to the finding is that plaintiff, having no knowledge of the partnership while the lumber was being delivered, charged to Lund all that part of the lumber ordered by him. But in cases of secret partnerships and dormant partners a creditor is entitled to recover from all the partners when discovered: Story on Partnership, sec. 138; Crawford v. Stovepipe Works, 83 Cal. 629, 24 Pac. 836. By the agreement assigned to Taylor and Somervell, under which the work was to be done, they were bound to purchase

the lumber from plaintiff; and, by their partnership agreement with Lund, Taylor and Somervell were to pay for the lumber and all other materials required for the work. A small part of the lumber, the price of which was $192.28, had been delivered to Lund, but not used, before the written agreement of partnership was executed, and was afterward used in the work. Counsel for appellants contends that Taylor and Somervell are not responsible for this in any event. I think, however, that the partnership agreement, and the fact that the lumber was used by the firm in the work, justified the court in finding that the partnership assumed the debt: Randall v. Hunter, 66 Cal. 512, 6 Pac. 331. Other points are made on the admission and exclusion of evidence, but in view of the existence of the partnership they are immaterial, and the rulings excepted to harmless. I think the judgment and order should be affirmed.

We concur: Foote, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SANTA CLARA VALLEY MILL AND LUMBER CO. v. WILLIAMS et al.

No. 14,438; December 8, 1892.

31 Pac. 1128.

Mechanic's Lien—Time of Filing Notice—Code of Civil Procedure, section 1187, provides that any trivial imperfection in the construction of any building shall not be deemed such a lack of completion as to prevent the filing of any lien. Held, that where a building was erected at a cost of $4,700 and was completed on March 7, 1889, with the exception of about $7 worth of alteration, which was done on April 6, 1889, the building was completed on March 7th, within the meaning of the statute, and a lien for materials furnished, filed more than thirty days after March 7th, was not in time.

Mechanic's Lien—Personal Judgment of Materialman.—Code of Civil Procedure, section 1183, provides that the contract for building

a house shall be in writing, and, before the work is begun, shall be filed with the recorder, otherwise to be void, and no recovery had thereon; and that labor done and material furnished by others than the contractor shall be deemed furnished at the instance of the owner, and be deemed a lien. Held, that when the original contractor had not filed his contract, and the materialman had not filed any lien under the statute, the latter is not entitled to a personal judgment against the owners of the building for material furnished the contractor.[1]

APPEAL from Superior Court, Santa Clara County; F. E. Spencer, Judge.

Action by the Santa Clara Valley Mill and Lumber Company against Joseph E. Williams and Mary A. Williams, owners of a building for which plaintiff furnished materials, and O. F. Fuller and E. L. Lashbrook, the contractors, to recover the value of the materials furnished. There was a judgment in favor of the owners, and a personal judgment against the contractors in favor of plaintiff. From the judgment and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

John R. Jarboe and W. S. Goodfellow for appellant; J. R. Patton for respondents.

VANCLIEF, C.—The defendants Joseph and Mary Williams, who are husband and wife, employed the defendants Fuller and Lashbrook to build a dwelling-house, for a price exceeding $1,000, under a written agreement executed before the work was commenced, but the contract was never filed for record in the recorder's office of the county in which the house was to be built. The plaintiff furnished the lumber to be used and which was used in the construction of the house to Fuller and Lashbrook under a contract with them alone. After the house was completed, viz., on April 16, 1889, the plaintiff filed in the office of the county recorder its claim and notice of lien upon the house, to secure an unpaid balance of $2,201.64, due for the lumber furnished to Fuller and Lashbrook. The object of this action is to recover a personal

[1] Cited in the note in Ann. Cas. 1912A, 134, on right to personal judgment in action to foreclose mechanic's lien.

Cited in the note in 35 L. R. A., N. S., 908, on the effect of the addition of new items to extend time for filing mechanic's lien.

judgment against all the defendants for the amount due plaintiff for lumber, and also to enforce the alleged lien. The court found as a fact that plaintiff's claim and notice of lien had not been filed for record within thirty days after the house was completed, and thereupon denied plaintiff any relief against the defendants Joseph and Mary Williams, and gave judgment in their favor for their costs, but rendered a personal money judgment against the defendants Fuller and Lashbrook for the amount claimed by plaintiff. Plaintiff appeals from the judgment in favor of Joseph and Mary Williams, and from an order denying its motion for a new trial as to them.

1. Appellant contends that the finding that plaintiff's notice of lien was not filed within thirty days after the completion of the house is not justified by the evidence. The evidence is sufficient to show that Fuller and Lashbrook completed their work upon the house on or before March 7, 1889, and that the house was accepted and used by Williams and wife before March 15, 1889, of all which plaintiff had notice. The house, as finished by Fuller and Lashbrook, had upon it an ornament called a "finial," and in it a water-closet. Some time after Fuller and Lashbrook had completed their work, including the finial and water-closet, Williams and wife expressed their dissatisfaction with the finial, because it was not large enough to correspond with the tower, and also complained that the seat in the water-closet was defective; and Mrs. Williams said she would rather pay for a larger finial than not to have it. Thereupon the plaintiff furnished a larger finial, and a satisfactory seat for the closet, which were delivered on March 21, 1889, and were put in place on the house, at the expense of the owners, on April 6, 1889. If the house was not completed until these alterations were made, the notice of lien was filed for record in due time; otherwise not. As to the imperfection of the finial and seat of the water-closet, and the alterations thereof, the court found that they were trivial in comparison with the entire construction of the house. This finding, also, is excepted to, as not being justified by the evidence. It appeared that plaintiff had estimated the price of the finial at $5, and the seat for the closet at $2, while the cost of the house, including the materials therefor, was $4,700. Upon this basis, I

think, the finding in question was justified by the evidence. Every essential part of the building had been constructed prior to March 7, 1889. Only two small items of the work was claimed to be imperfect, and to perfect these required an expense of only $7. Section 1187 of the Code of Civil Procedure provides that "any trivial imperfection in . . . . the construction of any building . . . . shall not be deemed such a lack of completion as to prevent the filing of any lien." In Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686, it was held that a defect in work which could be perfected at an expense of $5 was trivial compared with the contract price of $145. The case of McIntyre v. Trautner, 63 Cal. 429, applies to neither the law nor the facts of this case. In that case the owner refused to accept the work from the contractor until perfectly completed, and the contractor completed the work. In this case the contractors did nothing after they delivered their work; and there is no evidence that they did not complete the house according to the directions and designs of the owners (there being no valid express contract).

2. It is further contended that plaintiff was entitled to a personal judgment against Joseph and Mary Williams, the owners of the building, for the value of the lumber furnished to Fuller and Lashbrook. In the case of Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. 516, this point was directly decided against appellant's contention. This is admitted; but counsel for appellant contends that the decision in that case should be overruled. But, as the statute seems fairly susceptible of the construction put upon it by that decision, and since it does not appear that the ends of justice would generally be promoted by the construction proposed by counsel for appellant, I think the decision should stand. I think the judgment and order should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

MILLER v. BENSINGER.

No. 14,174; December 9, 1892.

81 Pac. 578.

Ejectment—Adverse Possession—Evidence.—In Ejectment for a Strip of land a few inches in width between adjoining lots, where it appeared that defendant had been for about twenty-five years in possession of the strip, which was by a survey included in his deed, when another survey was made, showing the strip to belong to plaintiff's lot, defendant's testimony that his occupancy was under a claim of right to hold the same adversely to plaintiff and the whole world is sufficient to support a finding for defendant as by prescription, though it also appeared that after the latter survey defendant offered to surrender the strip if plaintiff would pay the expense of moving the house which extended onto it.

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

Ejectment by Sarah Miller against Daniel Bensinger. Defendant had judgment, and plaintiff appeals. Affirmed.

Scrivner & Schell for appellant; M. Cooney for respondent.

FOOTE, C.—This is an action in ejectment for the recovery of a strip of land less than two feet in width, extending along the side of a lot occupied by the defendant. Judgment was given for the latter, from which and an order denying a new trial the plaintiff appeals.

It appears that the parties bought adjoining lots, under a certain survey. That about twenty-five years after the defendant took possession under his deed, occupied, fenced, and built upon what he supposed to be his lot of land, and which included that in controversy here, it appeared under a new survey for the city and county of San Francisco, where the land is situated, that he had in possession a lot of land wider by not quite two feet than his deed called for; and that the lot in possession of the plaintiff was thirty feet wide, less the same number of inches. Hence the plaintiff claimed that the defendant was by mistake in possession of a part of her lot, and sued for it.

The only question at issue, as we think, is whether the evidence supports the findings of fact in reference to the defense of the statute of limitations under sections 318 and 319

of the Code of Civil Procedure, set up by defendant. There is no dispute that all the necessary ingredients of this defense exist, save that the appellant contends that the occupation of the defendant is not shown by the evidence to have been taken and held with the intention to do so adversely to the plaintiff and all the world. The plaintiff strenuously argues that the defendant only intended to occupy the number of feet in width of land that his deed called for, and that, when the survey showed that he had in possession more than this quantity, then he acknowledged that the land in controversy belonged to the plaintiff, by offering to give possession of it to her if she would pay for the removal of his house, which stood upon it. We do not think that the offer of defendant amounted to anything more than an exhibition of a willingness to buy his peace and avoid a lawsuit: Furlong v. Cooney, 72 Cal. 329, 14 Pac. 15. He was asked, among others, these questions, and made answers thereto as follows: "Question. Now, what was the nature of your occupation there? Was it in your own right? The Court: That is admitted. Mr. Scrivner: Yes. Q. In other words, you were holding adverse to all the world? The Court: In his own right, he was holding. Whatever possession he had was in his own right. Mr. Cooney: Adverse to the world, to everybody? Answer. Yes, sir. Mr. Scrivner: Adverse in one sense. Mr. Cooney: He claimed it. Mr. Scrivner: I don't admit that he claimed it. The Court: Whatever possession he had there was held for himself. Mr. Scrivner: Yes. Mr. Cooney: Adversely to everybody? A. Yes (by witness). Mr. Scrivner: Well, it is before the judge." It will be seen that the defendant himself said that he claimed adversely to the whole world, which showed an intention to hold adversely to the plaintiff. In the face of this statement, which the defendant nowhere else varies from on this point, we see no error on the part of the court below in believing and finding that the defendant held the land intentionally adversely to plaintiff and the whole world. The findings are supported by the evidence, and the judgment and order should be affirmed, and we so advise.

I concur: Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

Ex Parte STRONG.

No. 15,255; December 12, 1892.

31 Pac. 574.

Habeas Corpus—Failure to Bring to Trial.—Though defendant is entitled to have the information filed against him dismissed under Penal Code, section 1382, which provides for such dismissal "if a defendant, whose trial has not been postponed on his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information," he is not entitled to a discharge on habeas corpus until the information is dismissed.[1]

Application of John Strong for a discharge from imprisonment on habeas corpus. Denied.

C. W. Thomas, J. Craig and J. E. Strong for petitioner; R. E. Hopkins, district attorney, for respondent.

PER CURIAM.—This is an application for a writ of habeas corpus based upon the following allegations: The petitioner was accused by information filed September 8, 1892, of the crime of assault with a deadly weapon. More than ninety days have since elapsed, but he has not been brought to trial. He has made no application for a postponement, and there is no excuse for the delay. He has asked the superior court in which the accusation is pending to order the prosecution to be dismissed, and that motion has been denied. These allegations, if true, show that it was the duty of the superior court to dismiss the prosecution (Pen. Code, sec. 1382); but until the information is dismissed the imprisonment is lawful. Writ denied.

[1] Cited with disapproval in In re Bergerow, 133 Cal. 353, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 829, in respect to the holding that, although the allegations of the petition be such that, if they are true, it is the court's duty to dismiss the prosecution, yet "until the information is dismissed the imprisonment is lawful."

Cited and rejected as authority in Ex parte Ford, 160 Cal. 345, 116 Pac. 761, as to the legality of the imprisonment "until the prosecution is dismissed," the court saying: "This doctrine, while supported by decisions in other jurisdictions, is opposed to the rulings in Ex parte Vinton, 5 Cal. Unrep. 000, 47 Pac. 1019, and In re Bergerow, 133 Cal. 353, 85 Am. St. Rep. 178, 56 L. R. A. 513, 65 Pac. 829."

JONES v. IVERSON.

No. 15,077; December 14, 1892.

31 Pac. 625.

Appeal—Certificate of Undertaking.—The provision of Code of Civil Procedure, section 953, that the clerk or attorneys shall certify that an undertaking on appeal in due form has been filed, is not complied with by a general certificate that the record is correct.

APPEAL from Superior Court, Mendocino County; R. McGarvey, Judge.

Action by David Jones, administrator, against Niles Iverson. From a judgment entered, plaintiff appealed, and defendant moves to dismiss the appeal. Motion granted.

Bert Schlesinger for appellant; J. A. Cooper for respondent.

PATERSON, J.—The respondent has moved, on several grounds, to dismiss the appeal. There is in the record a copy of what purports to be an undertaking filed in the court below, but there is no certificate of the clerk that an undertaking in due form has been properly filed. We have held several times that it is not sufficient to insert in the transcript a copy of an undertaking on appeal with a general certificate that the record is correct, but that it is necessary, in order to satisfy the express requirement of section 953, Code of Civil Procedure, to produce a certificate of the clerk or attorneys to the effect that an undertaking in due form has been properly filed in the court below: Swasey v. Adair, 83 Cal. 136, 23 Pac. 284.

The appeal is dismissed.

We concur: Garoutte, J.; Harrison, J.

WILKES v. TIBBETS et al.

No. 19,091; December 21, 1892.

31 Pac. 609.

Appeal—Matters not Apparent of Record.—Where the transcript shows that the findings of fact cover all the issues raised by the pleadings, and the judgment follows and is in conformity with the findings and conclusions of law drawn therefrom, affidavits, though contained in the transcript, claiming that a litigant had been erroneously denied a jury trial by the court, will not be regarded on appeal, where it does not appear that the affidavits were served on the adverse party, or were filed in court or certified to as having been used at the hearing on a motion for a new trial.

APPEAL from Superior Court, San Bernardino County; George E. Otis, Judge.

Action by C. R. Wilkes against Luther C. Tibbets and another. From a judgment against them, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

L. C. Tibbets, in pro. per., and A. B. Paris for appellants; W. A. Purington and J. Ludewig Koethen (Walter L. Koethen of counsel) for respondent.

BELCHER, C.—This is an appeal by the defendants from a judgment entered against them, and an order denying their motion for a new trial. The transcript contains the judgment-roll, a notice of intention to move for a new trial, an order denying a new trial and certain affidavits. The findings recite that: "This cause came on regularly for trial on the twentieth day of May, 1891, before the court without a jury, a jury trial having been wavied by the parties." And the judgment recites that, "a trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury." The findings of fact cover all the issues raised by the pleadings, and the judgment follows in conformity with the findings and conclusions of law drawn therefrom.

The notice of intention to move for a new trial states that the motion will be made upon the following grounds: (1) Ir-

regularity in the proceedings of the court; (2) order of court and abuse of discretion by which defendants were prevented from having a fair trial; (3) surprise, which ordinary prudence could not have guarded against; (4) errors in findings; (5) error in the judgment. The notice further states that the motion will be made upon affidavits. The affidavits are to the effect that, before the case came on for trial, the defendant, Luther C. Tibbets, duly demanded a jury trial, and that a venire was issued, and sixteen jurors were summoned and were in attendance on the day set for the trial; that when the case was called for trial the said defendant asked to have a jury impaneled, but the court refused to comply with his request, and ordered him to pay the amount of the juror's fees, $21, into court before he could be allowed to make his defense to the action; that he paid the said $21 into court, and the jurors were then discharged by the court, against the will, and without the consent, and in opposition to the demand of defendant; and that the said order of the court was an abuse of discretion, by which the defendants were prevented from having a fair trial. It is further stated that the court erred in making several of its findings, and that the facts found were not true; also, that it erred in its judgment, in stating that a trial by jury was expressly waived by the respective parties. Appellants contend that, in view of the facts shown by these affidavits, the judgment should be reversed, and the cause remanded for a new trial. Conceding, without deciding, that the point can be made on affidavits that a litigant has been erroneously denied a jury trial, still a conclusive answer to appellants' contention is that, while the affidavits here relied on are found in the transcript, it does not appear that they were ever served on the adverse party or filed in court, nor are they in any way certified to or identified as having been used on the hearing of the motion. This being so, they cannot be looked to here for any purpose, but must be wholly disregarded: Johnson v. Muir, 43 Cal. 542; Baker v. Snyder, 58 Cal. 617. The judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HAYNES v. BACKMAN et al.

No. 19,000; December 27, 1892.

31 Pac. 745.

Mortgage Foreclosure—Setting Aside—Discretion.—In a proceeding to set aside a foreclosure sale on a showing promptly made, it appeared that the property had brought a very inadequate price; that the deputy having the matter in charge had been asked to bid for the mortgagee in the latter's absence, but had neglected to do so; that the mortgagee's intention to bid was known to the purchaser; and that the mortgagee could not collect any of the deficiency from the mortgagor. Held, that the court might properly set aside the sale.

APPEAL from Superior Court, Los Angeles County; J. W. McKinley, Judge.

Proceeding by Mary E. Haynes against Peter Backman and others and the Los Angeles Terminal Land Company to set aside a sale of property made under a mortgage foreclosure. Order setting aside the sale. The defendant land company appeals. Affirmed.

Burnett & Gibbon for appellant; Geo. I. Cochran, Henry Bleecker and John T. Jones for respondents.

TEMPLE, C.—This is an appeal by a purchaser at a sale of property under foreclosure of a mortgage from an order setting aside the sale. From the affidavits used on the motion, the court below may have believed the following to be the facts in reference to the sale: The amount found due on the mortgage, including costs, was about $1,600; that the land was worth that sum; that plaintiff had instructed her attorneys to attend the sale, and in case no one bid more, or an equal sum, to bid for her the amount of the judgment and costs; that one of her attorneys, Cochran, was intending to carry out this instruction, and informed the deputy sheriff who had the matter in charge of that fact, and instructed the deputy, in view of the fact that the sale was fixed for Monday, which was law day, when he might be busy in court, that in case he was not present to bid for his client the

amount due on the judgment; that the purchaser, or its agent, was well aware of plaintiff's intention to bid the full amount of the judgment; that the defendant, who joins in the motion, inquired of plaintiff's attorney as to his intention with reference to the sale, and on being informed that he would bid the amount of the judgment, and that there would be no judgment for deficiency, relying upon the promise, made no effort to have the property bring a larger sum, being satisfied if the property should pay the debt; that the sale was advertised for October 19, 1891, at 12 M.; that on that morning Cochran was actually engaged in the argument of a demurrer, and was delayed by this business a few moments after 12 o'clock, but still hurried to the place of sale, expecting to be in time; but, although he arrived within twenty minutes after 12, the property had been struck off to appellant for $500, and the amount paid to the sheriff. On the same day, an order to show cause on the next day why the sale should not be set aside was obtained, and served on the purchaser. On the hearing, which by consent was adjourned for five days, the order appealed from was made. It also appeared that plaintiff would be unable to collect any deficiency from the defendant. Some of these facts were controverted, but it devolves upon the appellant to show error. Unless, therefore, we can plainly see that the conclusion reached by the court, from the affidavits, was erroneous, we cannot interfere with its discretion. It is true it has been held that mere inadequacy of price will not justify a court in setting aside a sale where all the proceedings are regular and free from fraud or mistake. Still, in numerous cases upon this subject, that fact figures as an important factor. Here the attorney had left with the deputy sheriff his bid. Such course is not unusual, and, if the deputy was unwilling to accept the bid in that form, he ought to have informed the attorney of such fact, in which case, very likely, knowing that he might be detained, he would have had some person present to bid for him. Setting aside the sale so promptly will harm no one except a purchaser who insists upon an unfair advantage obtained by this excusable neglect on the part of plaintiff's attorney, while the client will be irreparably injured if the sale is allowed to stand. Greater delinquency has been found excusable by

this court in many cases: Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332. As said in Buell v. Emerich, supra, very great discretion is conceded to the trial court in regard to these matters, in the interests of justice. We cannot say that such discretion has been abused in this case. We therefore advise that the order appealed from be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

HAYNES v. BACKMAN et al.

No. 19,001; December 27, 1892.

31 Pac. 746.

Appeal—Record.—Questions Which can be Determined Only from the evidence are not reviewable on an appeal taken upon the judgment-roll alone.

Judgment Against Parties not Named.—The Fact That a Certain Corporation is named as defendant in a complaint, while judgment is rendered against another not named, does not render the judgment irregular, where the latter appeared and filed an answer which, if true, showed the identity of the two.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Proceeding by Mary E. Haynes against Peter Backman and others and the Los Angeles Terminal Railway Company. Judgment for plaintiff. The defendant railway company appeals. Affirmed.

Burnett & Gibbon for appellant; Geo. I. Cochran, Henry Bleecker and John T. Jones for respondents.

TEMPLE, C.—This appeal is from the judgment, without a bill of exceptions. Two points are made:

1. The appellant purchased from the mortgagor, subsequent to the mortgage, a strip of land, part of the mortgaged premises, for a right of way. In its answer, appellant asked to have the land divided and sold in parcels, the division to be as divided by the railroad, and that the strip occupied by the appellant should be sold only in case sufficient money could not be realized from the residue to pay the mortgage. This was not done. There being no bill of exceptions, and no findings, we do not know that the appellant acquired title to the strip of land by conveyance from the mortgagor after the mortgage was given, or that a sale in separate parcels can be had to advantage, or without danger of depreciating the price which might be realized to the extent of preventing plaintiff from realizing the amount of her mortgage. These were questions to be determined from the evidence, and on the appeal upon the judgment-roll alone we cannot review the action of the court.

2. The appellant was not named in the complaint as a defendant, but the Los Angeles, Pasadena and Glendale Railway Company was. The judgment is not against the last-named company, but is against appellant. The complaint was not amended so as to include the appellant. It is contended that the judgment is irregular, under the rule laid down in McKinlay v. Tuttle, 42 Cal. 570, and Campbell v. Adams, 50 Cal. 203. Though not named as a party, appellant appeared and filed an answer, in which it is stated: "Comes the Los Angeles Terminal Railway Company, a corporation duly organized under the laws of this state, and leave of court having first been obtained to appear and defend said action," etc. The answer then proceeds to aver a sale and conveyance of a portion of the mortgaged premises by the mortgagor, after the execution of the mortgage, to the other corporation named in the answer; that subsequent to that conveyance the Los Angeles Terminal Railway Company had consolidated with the other named corporation, under the name of the "Los Angeles Terminal Railway Company." The judgment recites that appellant "has been duly made a party defendant to this action by order of the court." Evidently this means that appellant was made a party as successor in interest to the other named defendant. As a matter of fact, the answer, if true, shows the identity

of appellant with the corporation defendant named. There is no injurious error in this.

The judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

TOWER v. McDOWELL, Sheriff.

No. 19,004; December 29, 1892.

31 Pac. 843.

Execution.—Where, in Trover Against a Sheriff, who claimed to hold by virtue of a levy under an execution, plaintiff introduced in evidence the execution under which defendant justified the taking, and his return thereon, showing the levy and sale and amount received from such sale, the exclusion of oral testimony as to what the property sold for is not harmful to the defendant.

Execution.—Where It Appeared by the Sheriff's Return on an execution that a levy under it was not made until after the expiration of the life of the execution, such levy by a sheriff is without jurisdiction.

APPEAL from Superior Court, San Diego County; John R. Aitken, Judge.

Trover by Virginia A. Tower against S. A. McDowell, sheriff. From a judgment for plaintiff, defendant appeals. Affirmed.

Sprigg & Barber for appellant; Shaw & Holland for respondent.

VANCLIEF, C.—Action in the nature of trover to recover the value of certain personal property of plaintiff's, alleged to have been wrongfully taken and converted to his own use by the defendant. The defendant denied that the plaintiff owned or possessed the property at the time it was taken,

and alleged that it was then owned and possessed by F. C. Tower, plaintiff's husband, and F. E. Bates, from whom defendant, as sheriff, took it by authority of a writ of execution against them in favor of the First National Bank of San Diego. It was further alleged in the answer of defendant that F. C. Tower and F. E. Bates made a bill of sale of the property to plaintiff without consideration, and for the purpose of defrauding their creditors, and that the sale was not accompanied by an immediate delivery of the property, nor followed by an actual or continued change of possession thereof. The cause was tried without a jury, and the court found the facts on all the material issues in favor of the plaintiff, and rendered judgment accordingly for the sum of $3,349.39. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The evidence, though conflicting, on the issues as to value, immediate delivery, and continued change of possession of the property, is sufficient to justify all the findings of fact, and the findings support the judgment; nor do appellant's counsel seem to contend with much confidence to the contrary, but in their reply brief say: "The principal error complained of by appellant on the trial, on the motion for new trial, and on this appeal, is the refusal of the trial court to permit evidence of the sums for which the property sold at a well attended, fairly conducted auction sale, at which the bidding was spirited, and the competition sharp." This refers to the sheriff's sale of the property in question, consisting of the stock of a livery-stable—horses, buggies, wagons and appliances, about fifty in number. Indeed, the only possible ground for reversal available to appellant is that the court erred in excluding or admitting evidence touching the issue as to the value of the property, since the defendant did not offer in evidence the execution under which he justified the taking, nor any execution whatever, nor the return upon any execution. The plaintiff, however, in rebuttal, put in evidence the execution under which defendant justified (issued March 5, 1889), and the sheriff's return thereon, showing that he received the execution on March 5, 1889, levied it on July 13, 1889, and sold the property on July 29, 1889, in separate parcels, for the aggregate sum of $2,355.42. It thus appears that the best evidence of what the property sold for was in-

troduced by the plaintiff, so that the rejection of oral evidence offered by defendant, even if competent, could not have injured him. Besides, it does not appear that the court excluded oral evidence of the aggregate sum for which all the property sold. Defendant asked one of his witnesses the following question: "Do you know whether or not the sheriff's sale of the property described in the complaint was advertised by printed handbills scattered through the cities of San Diego and Coronado?" This question being objected to, the defendant's attorney made the following offer: "We offer to prove by the witness and by others that the sale by the sheriff was thoroughly advertised in San Diego and Coronado Beach; that a large number of bidders were present at the sale, and there was a great competition in the purchase of the property, and that the property described in the complaint brought on the sale less than $2,000." Upon objection to this offer the court said: "I shall sustain the objection to the question. There is a part of the offer that is competent. The objection to the offer will be overruled." Yet the defendant did not then or afterward offer evidence of any part of what he had offered to prove, except that he afterward asked another witness what a single hack sold for, which was immaterial, without an offer to prove what all the property sold for.

By the introduction of the execution in evidence it further appeared that the alleged levy was not made until long after the expiration of the life of the execution, it having been issued on March 5th, and not levied until July 13th. Upon the execution are the following indorsements:

"S. A. McDowell, Esq., Sheriff of S. D. County.

"Sir: The within execution and judgment is properly assigned to C. L. Barber by the bank. We have further authority to represent said judgment.

"July 12, 1889.

"Yours, etc.,
"SPRIGG & BARBER, Atts."

"The within execution is hereby renewed, and the time of its return extended sixty days.

"July 13, 1889.

"SPRIGG & BARBER,
"Plaintiff's Attys."

These indorsements did not revive or renew the execution, and counsel for appellant do not so contend. At the time the defendant attempted to execute it by taking the property in question it was functus officio, and afforded no jurisdiction for the taking, and the defendant is liable for the taking to the same extent he would have been without any writ in his possession: Freeman on Executions, sec. 106, and case there cited. If the views above expressed are correct, all other questions mooted are immaterial. I think the judgment and order should be affirmed.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

ROUSSET v. REAY et al.

No. 14,368; January 3, 1893.

31 Pac. 900.

Ejectment — Alias Writ of Possession.—Plaintiff having obtained judgment in ejectment, a writ of possession was issued and executed in 1882 against defendants and one M., who was not a party to the suit, and a few months later M. re-entered, and remained thereafter in exclusive possession. In 1889, plaintiff moved for an alias writ of possession against defendants and M. Held, that M. could show on such motion that he was not a member of defendants' family, and that his possession was open and notorious, and that he was the owner of the premises in dispute, and was not a party to the ejectment suit.

Ejectment—Writ of Possession.—Where M.'s Possession was Adverse for more than six years from the time of his re-entry, and ripened into a new title, it could not be affected by the former judgment.

Ejectment.—A Motion for an Alias Writ of Possession should not be entertained where the lapse of time after re-entry is sufficient to create a title in an adverse possessor, and bar an action of ejectment.

Ejectment—Alias Writ of Possession.—Where Judgment for plaintiff in ejectment is fully executed by putting plaintiff in possession, an alias writ of possession cannot issue except upon an adjudication that the person against whom the writ is to run is guilty of a contempt. Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33, followed.[1]

APPEAL from Superior Court, City and County of San Francisco; John Hunt, Judge.

Ejectment by Paul Rousset against Joseph W. Reay and others and William McGrath. From an order granting plaintiff's motion for an alias writ of possession, William McGrath appeals. Reversed.

T. M. Osmont for appellant; Smith & Murasky and J. F. Smith for respondents.

HAYNES, C.—Appeal from an order granting a motion for an alias writ of possession. In 1873, Rousset recovered judgment in ejectment against Peter McGrath and three other defendants for the possession of certain lands, and that judgment was affirmed on appeal in May, 1882: 60 Cal. 328. August 24, 1882, a writ of possession was issued thereon, which was fully executed August 28, 1882, and under which appellant, among others, was removed from the premises. In November, 1882, appellant, who was not a party to the ejectment suit, re-entered upon the premises, and took possession for himself, and ever since has remained in the exclusive possession. Frederick Hess and Patrick Slater, the successors in interest of Rousset, the plaintiff, moved the court in said cause for an alias writ of possession against appellant and two others, neither of whom were defendants in the ejectment suit. The order was granted, and appellant took a bill of exceptions presenting the facts.

The appellant offered to prove by his own testimony the following: "(1) That at the time of the commencement of this action, to wit, on the 5th of June, 1873, and for a long time prior thereto, he, the said William McGrath, was in the open and notorious possession of said premises, claiming to own the same, and that he was the owner thereof. (2) That he was not, and is not, a party to this action, and that ever

[1] Cited in the note in 135 Am. St. Rep. 647, 649, on remedies of a plaintiff dispossessed after being put in possession under a judgment in ejectment.

since his re-entry upon said premises (in November, 1882), as aforesaid, as well as during all the period from and prior to the commencement of this action, down to the time of his ejection under said writ, he claimed, held and possessed said premises in his own right, and under his own independent title. (3) That he was not a member of his father's (Peter McGrath's) family at the time of the commencement of this action, nor at any time since." To each of these offers Hess and Slater objected on the ground of irrelevancy and immateriality, and the objections were each sustained by the court, and the evidence excluded.

The court erred in not permitting appellant to prove the facts which he offered to prove, as it would have shown that he occupied no such relation to the defendants as to justify his dispossession under the writ. Appellant further contends that, if respondents' rights were otherwise plain, they have slept on it too long to invoke this summary remedy.

The judgment was affirmed in March, 1882, and this motion was made in January, 1889. The writ of possession was executed and appellant dispossessed in August, 1882, and appellant re-entered in November, 1882, and was in possession more than six years after his re-entry—a period more than sufficient to quiet title by adverse possession; and if the possession were adverse, as it may have been, and had ripened into a title, it was then a new title, which could not be affected by the former judgment. Without undertaking to fix a limitation as to the time within which proceedings of this character generally may be taken, but confining ourselves to cases where the proceeding is taken against one who was not a party to the judgment, there can be no doubt that, where the lapse of time after the re-entry is sufficient to create a title in an adverse possessor and bar an action of ejectment, the motion should not be entertained. It is not necessary to consider, and we do not decide, whether in any case under section 1210, Code of Civil Procedure, an alias writ can issue after the judgment becomes dormant. In the case at bar, as we have seen, the judgment having been fully executed by putting the plaintiff in possession, an alias writ could not issue except upon an adjudication that appellant was guilty of a contempt, and there was no such adjudication. The order, as made, was simply that an alias writ issue, and that seems to have been the sole object of the motion. Appellant here occupied a situ-

ation precisely similar to that occupied by Elizabeth Muir and Peter Baker in the case of Huerstal v. Muir, 64 Cal. 450, 2 Pac. 33, where an appeal from a similar order was entertained. The exclusion of the evidence offered by appellant requires a reversal of the order, but we think the facts disclosed by the evidence put in by Hess and Slater, the moving parties, show that the motion should not be entertained. We therefore advise that the order appealed from be reversed, with a direction to the court below to dismiss the motion.

We concur: Belcher, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed, with a direction to the court below to dismiss the motion.

PETITION FOR REHEARING.

February 3, 1893.

PER CURIAM.—Ordered: The petition for a rehearing herein is denied, but the judgment of the department is hereby modified so as to read as follows: "The order appealed from is reversed and the cause remanded for further proceedings."

FOERST v. MASONIC HALL ASSOCIATION OF SOUTH SAN FRANCISCO.

No. 14,184; January 5, 1893.

31 Pac. 903.

Mortgage—Default in Interest—Excuse.—A Mortgage Given to plaintiff by defendant association provided that there should be quarterly payments of interest, and that, on failure to so pay, the whole sum, at plaintiff's election, should become due. After the papers had passed defendant's officers agreed that plaintiff could have the payments monthly, by calling for them, to which plaintiff assented, and for several months thereafter called and received her interest. Later, she failed to call, the interest was not paid, and plaintiff sought to have the whole debt declared due. Held, that, after plaintiff's promise to call for the interest, defendant was excused from seeking her, to

make payment, and, since the failure to pay was caused by her own act, she could not exact a penalty for such failure.

Mortgage—Default in Interest—Claim of Forfeiture.—The fact that plaintiff called for the interest once, when defendant's president, who always paid her, was not in, does not aid her claim of forfeiture, when it does not appear that she demanded the interest from anyone else, nor that, at the time she called, any interest was due.

Mortgage — Default in Interest.—A Finding That Plaintiff Authorized an agent to collect the interest, and that he demanded it from defendant's president, who refused to pay unless he brought a written order from plaintiff, is contrary to the evidence, when the only testimony on the subject is that of the agent, who stated that he called on defendant's president, and asked him about the interest, and the president said that the money was ready for plaintiff, but that he would like to have an order before paying it, to which request the agent made no objection.

Mortgage—Default in Interest.—A Finding That Plaintiff's Attorney, both before and after October 1st, which was more than three months after the last payment, demanded payment of the interest, and that such payment was refused unless he had written authority, if true, would not be conclusive of a default; for the question would still be open as to whether defendant had reasonable ground to doubt the attorney's authority.

Mortgage—Default in Interest.—Where Plaintiff Knew that defendant's agents were looking for her, to pay the interest, but she did not inform them where she was, or that she had authorized an agent to receive the money, failure of defendant to pay the interest within the prescribed time does not constitute a default.

APPEAL from Superior Court, City and County of San Francisco; J. P. Hoge, Judge.

Action by Minna Foerst against the Masonic Hall Association of South San Francisco to foreclose a mortgage. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. & Geo. Leviston for appellant; F. J. Castelhun for respondent.

TEMPLE, C.—This is an action to foreclose a mortgage, in which the plaintiff had judgment, and the defendant appeals from the judgment, and from an order refusing a new trial.

A preliminary objection is made to the statement, on the ground that it was not served in time. The judge made an order extending the time thirty days, in which "to serve notice of intention to move for a new trial, and the proposed bill of exceptions." Within that time the notice of intention was duly served and filed, and within ten days thereafter another order was made, extending the time to prepare and serve a bill of exceptions and statement of the case thirty days, in addition to the time allowed by law. The statement was prepared and served within the period of the extension, and was therefore in time.

Among other necessary allegations the complaint contains the averment, that on the twenty-eighth day of November, 1888, defendant executed to plaintiff its note for $7,000, payable four years from date, with interest at the rate of seven per cent per year, payable quarterly, which note further provided "that if default is made in the payment of the interest, as it becomes due, the same shall be added to, and become and form a part of, the principal, and bear a like rate of interest, or that the whole amount, of both principal and interest, shall become due and immediately payable upon such default, at the option of the payee." A proviso to the same effect was also inserted in the mortgage. It is also alleged "that on the twenty-eighth day of August, 1889, there became due and payable to plaintiff, as interest on said note for the two months immediately preceding said date, the sum of $81.66; that said sum was not paid until on or about the fifth day of October, 1889, on which day said defendant paid to plaintiff the sum of $122.50, as interest on said note, for the three months ending September 28, 1889; that immediately before and after said payment was made, the plaintiff notified said defendant that she elected to consider the whole amount of the principal and interest due on said note as immediately due and payable," etc. Defendant answered, denying that either before or after September 28, 1889, or at any time, plaintiff notified defendant that she elected to consider the whole amount of principal and interest of said note as immediately due and payable, and defendant avers that shortly after the execution of said note and mortgage plaintiff requested that the interest be paid monthly instead of quarterly; that the defendant consented to pay the interest monthly, in-

stead of quarterly, if plaintiff would call for the interest monthly at the office of Dr. Todd, the president of defendant, in the afternoon of the 10th of each month; that plaintiff agreed to this, and did call and receive and collect her interest monthly, in pursuance of the agreement, for several months, but thereafter failed to call for the interest, and concealed herself from the defendant, its officers, and agents, with intent to evade the payment to her of said interest; that the defendant, and its officers and agents, ever since the failure of plaintiff as averred, made diligent search and inquiry as to her whereabouts, in order to tender to her the interest, but have not been able to find her, by reason of her concealing herself, and finally, on October 5, 1889, learning that Castelhun would receive payment for her, promptly paid the amount to him for her; that this was the first opportunity defendant had to pay said interest; that defendant was at all times ready and willing to pay the interest according to the terms of the note. The case was tried by the court without a jury, and findings were filed, to which exceptions are taken on the ground that they are contrary to and not supported by the evidence.

The first finding is almost in the language above quoted from the complaint, to the effect that plaintiff notified defendant, before and at the time of the payment of interest on October 4, 1889, that she elected to consider the whole amount of principal and interest due. Under the view I take in this case, I doubt if this finding is material, but I find no evidence whatever which proves, or tends to prove, that before the payment a syllable was ever uttered in regard to such election. Plaintiff's attorney, Mr. Castelhun, was the only witness for plaintiff in regard to this matter. He shows considerable correspondence in regard to some alleged defects in the title to the mortgaged property prior to October 4th, but not a word in regard to any such option. In regard to the payment on the 4th, he said: "Mr. Shaw gave me that check for the interest, and I gave him the following receipt [here follows a receipt for the money], without waiving any rights, and exercising the option of considering the whole amount of said note now due." He then says: "I informed Mr. Shaw, right then and there, that we elected to consider the whole amount of the note and mortgage due." This is

all there is in regard to the matter, and it does not appear that a word was said in regard to the option to consider the whole amount due until Castelhun had the check in his hand.

The second finding is to the effect that defendant never authorized anyone to agree that the interest should be paid monthly at the office of Dr. Todd. The point of this finding is said to be that the board of directors of defendant did not authorize or ratify the agreement. There is no conflict in the evidence showing that plaintiff did agree with the officers of defendant that she would call monthly upon Dr. Todd, and collect the interest. Dr. Todd, the president of defendant, testified that plaintiff called upon him, and complained that the interest was payable quarterly, when she understood it would be paid monthly, and said she must have it monthly. He told her to see Dunshee, the secretary, and he thought they could arrange the matter if she would call about the 10th, in the afternoon. She saw Dunshee about it. She did call monthly, and collect her interest until July, when she received two months' interest. Dunshee testified that he conversed with her about the matter, and finally told her that they would pay her if she would call after the first week at Dr. Todd's for it. "She said she would, and she was very glad to have it that way." This testimony is not controverted, but it is shown that there was no action on the subject by the directors. But, for the purposes of the defense, it was not necessary that there should have been a valid contract, changing the terms of the note. It was enough that she had promised to call in person for the interest, to excuse defendant from seeking her to make tender or payment. That they failed to do so was caused by her own act, and she cannot exact a penalty for the failure. If she desired to retract her promise, and stand upon her rights under the mortgage, good faith required that she should have first notified the agents of the defendant that she would call no more.

The third and fourth findings relate to the same subject, and are sufficiently discussed.

The sixth finding is to the effect that plaintiff called at the office of Dr. Todd in the latter part of the month of August, once for her interest, but no interest was paid to her. Perhaps this is verbally true, but, as applying to any issue in the case, it is misleading, and unsupported by the

evidence. Plaintiff testified that she called twice, but Dr. Todd was not in, and it does not appear that she demanded her interest from anyone. At that time the officers of defendant had no cause to suppose that she did not intend to keep her promise to call personally for her interest. Furthermore, it does not appear that when she called any interest was due her. It fell due on the 28th, and the latter part of August would include time prior to that date.

The seventh finding is to the effect that plaintiff, in September, authorized one Rosekamp to collect the interest, and that the agent demanded it from Dr. Todd, who refused to pay unless he brought a written order from plaintiff. This finding is not only unsupported by the evidence, but is contrary to all the testimony upon the subject. Rosekamp is the only witness who gave testimony relating to the matter. He said, after showing his authority: "I went there, and asked the doctor about it, and he said he would like to get an order from Mrs. Foerst to pay that. That was all the conversation I had about the matter. I told him that I was authorized by Mrs. Foerst to collect the interest. I had known Dr. Todd fifteen years, and he knew my official position. Cross-examination: Dr. Todd said that the money was ready for Mrs. Foerst, but that he would like to have an order before paying it." This testimony, so far from showing that Dr. Todd declined to pay the interest, shows his entire readiness so to do. He expressed a desire for a written order, and plaintiff's agent made no objection to this reasonable request, but, on the contrary, seemed to acquiesce in it. Dr. Todd had no reason to suppose that his request was or could be construed into a refusal to pay. The request was a reasonable one, and should have been complied with. The fact that oral authority is sufficient to authorize the agent to collect does not affect the question. Rosekamp was a public officer, and was not an employee of plaintiff. Defendant had a right to have the payment indorsed upon the note or a receipt from plaintiff for the money. He had a right to reasonable evidence of the agency. Rosekamp did not have the note with him. Under such circumstances, fair dealing required, at the very least, that defendant's agent should have been made to understand that a failure to pay without a written order would be taken as a refusal to pay. The agent of plain-

tiff not only did not make an absolute demand for payment without the order, but apparently acquiesced in the request.

Finding 8 is to the effect that plaintiff's attorney, Castelhun, both before and after October 1st, demanded payment of the interest, and that such payment was refused unless he had written authority. If true, this finding would not be conclusive of a default. The question would still be open as to whether defendant had reasonable ground to doubt Castelhun's authority. One must be satisfied with reasonable evidence of the authority of an agent, when required to pay money, or refuse to do so at his peril. But such reasonable evidence he is entitled to demand. But the evidence does not support the finding that such demand was made before October 1st, or that payment was ever declined unless written authority was produced. Some evidence there is that Castelhun told Leviston, defendant's attorney, about October 1st, that Castelhun was authorized to receive the money. Leviston was then, so far as appears, only employed in reference to alleged defects in the title of defendant to the mortgaged premises, and it does not appear that this statement was ever communicated to defendant's agents. Such a demand was made by Castelhun on defendant, October 1st, and apparently at the first interview thereafter between Shaw and Castelhun the interest was paid, to wit, October 4th.

The tenth finding is to the effect that plaintiff did not conceal herself with intent to evade the payment of interest to her. In this finding the court probably intended only to say that the concealment was not with the intent to evade the payment of the interest; but even in this it is against the evidence, and on this point there is no conflict. It must be remembered that parties occupying this continued relation owe each other, all the way through, fair and honest dealing. It was the duty of plaintiff to inform defendant of her address, or her agent's; and if she did not do so, and defendant made reasonable effort to find her, and failed, there was no default. On this subject plaintiff testified: "I know that the defendant's agents were looking for me. Question. Well, didn't you conceal yourself from them? Answer. Nonsense! What did I want to do that for? Q. Could they have found you? A. Well, indeed, I did not want them to find me, for I did not want to deal with them any more. I had two men

employed to attend to my matters. The Court: Q. Did you tell them that these gentlemen would collect the interest for you? A. Tell, who, sir? Q. The association, or the officers of the association? A. No, I did not tell the officers. You know I told Dr. Todd when I collected the interest the last time. I said, 'I don't know who collects the interest next month,' for I intended then to go back east or to Germany. He said, 'It makes no difference'; and then I sent Mr. Rosekamp. Q. Well, did you tell him that you would send Mr. Rosekamp? A. No, sir; but they knew Mr. Rosekamp for ten or twelve years, if not longer. He is an officer out there. He is sergeant of the police. Q. Did you ever notify them you had two men employed to attend to your matter? A. They knew, three weeks before I authorized Mr. Castelhun to collect the interest, that I had employed some one, for they gave Mr. Castelhun the deed of the lot which was mortgaged to me. So they must have known that he was employed in the matter. I didn't tell any of the officers of the association that these two gentlemen were authorized to collect interest for me. I didn't tell them that I would send Mr. Rosekamp. I knew that the officers of the association were looking for me after the interest became due, but I didn't want to see them. I did not want to deal with them any more after the president of the German bank told me that the mortgage was not a perfection, and that it was very hard for me, a lone-standing woman, to look after the matter." It is difficult to doubt the motives of plaintiff, after reading her testimony. What knowledge the officers of the association had of the authority of her agents has been sufficiently considered.

The eleventh finding is to the effect that defendant did endeavor to find plaintiff, but failed, and its officers were informed that she did not wish to meet them, but that her attorney had full power to transact her business. The last clause of the finding is entirely unsupported by the evidence, so far as it is applicable to the condition of things prior to October 1st.

The twelfth and thirteenth findings are unsupported by a scintilla of evidence, but, on the contrary, are against the evidence, which is without conflict.

It follows that the judgment must be reversed and a new trial had. The other points, under the circumstances, are not mentioned.

We concur: Belcher, C.; Vanclief, C.

McFARLAND and HARRISON, JJ.—For the reasons given in the foregoing opinion the judgment is reversed and a new trial ordered.

DE HAVEN, J.—I concur in the judgment. I think the evidence sufficient to support finding No. 1; but, in respect to other questions discussed, I concur in the foregoing opinion.

RICHARDSON et al. v. DUNNE et al.

No. 14,587; January 7, 1893.

31 Pac. 737.

Appeal—Matters not Apparent on Record.—A finding by the trial court that plaintiffs' causes of action are barred by limitation is conclusive on appeal, where no exceptions were taken to such finding, and where the appeal was not taken within sixty days after judgment rendered.

APPEAL from Superior Court, City and County of San Francisco; J. P. Hoge, Judge.

Action by Elizabeth C. Richardson and others against Kate Dunne and Alice Dunne to quiet title to land. Judgment for defendants. Plaintiffs appeal. Affirmed.

J. C. Bates for appellants; W. S. Goodfellow for respondents.

VANCLIEF, C.—Action to quiet title to land. On the first trial there was a judgment for plaintiffs, from which, and an order denying their motion for a new trial, the defendants appealed, and the judgment and order were re-

versed and a new trial ordered: 82 Cal. 174, 16 Am. St. Rep. 101, 23 Pac. 9. On the new trial, judgment passed for defendants, from which plaintiffs bring this appeal on the judgment-roll, containing a bill of exceptions as to questions of law, but raising no questions of fact.

All the questions of law presented by the record on this appeal were decided on the former appeal; and the judgment on the new trial, from which this appeal is taken, appears to be, and is admitted by appellants' counsel to be, in strict accordance with the law of the case, as expressed on the former appeal. In his opening brief counsel for appellants says: "As the former decision of this court is the law of the case, right or wrong, so far as this court is concerned, we do not deem it proper to more than state our points and objections here, which we still believe well taken, but we realize that we must now take our chances in another forum to realize our expectations." In his closing brief, counsel makes a point on the finding by the court on the new trial that plaintiffs' causes of action were barred by sections 1573 and 1574 of the Code of Civil Procedure "as the same existed prior to the amendment thereof in the year 1880." Nothing as to this was decided on the former appeal; but the conclusion that the causes of action were barred does not appear to be an erroneous conclusion from other facts found, or in any way disclosed by the record; and since there is no exception to the findings, and as the appeal was not taken within sixty days after the rendition of the judgment, the findings must be regarded as conclusive as to the facts. Besides, the judgment is well supported by other findings, regardless of the finding that the causes of action were barred. I think the judgment should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

It follows that the judgment must be reversed and a new trial had. The other points, under the circumstances, are not mentioned.

We concur: Belcher, C.; Vanclief, C.

McFARLAND and HARRISON, JJ.—For the reasons given in the foregoing opinion the judgment is reversed and a new trial ordered.

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We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

WILLARD v. TATUM et al.

No. 14,798; January 10, 1893.

31 Pac. 912.

Sale—Rescission—Return of Goods.—A Seller of Stationary Engines will not be relieved from his agreement to rescind the sale, and accept their return, by the mere fact that the purchaser returned one more engine than specified in the agreement, without, however, requiring its acceptance by the seller as a condition to the return of the others.

Sale—Rescission—Delay in Return of Goods.—A Delay of Eight Months in shipping the engines after it was agreed that they should be returned by the purchasers from San Francisco to the sellers at Chicago, by a shipment via Cape Horn, is not so unreasonable, as matter of law, as will relieve the seller from his obligation to accept them, where it appears that they had been paid for by the purchasers; that the seller had the use of the money during all this time; that no loss was suffered by the delay; that the refusal to accept them was based on a claim that a change in the pattern of the engines rendered those returned less valuable than formerly; that some of the returned engines were in a branch house of the purchasers at Portland, Oregon, and had to be brought to San Francisco for shipment; and that the engines were in fact shipped by the first vessel carrying a miscellaneous cargo.

APPEAL from Superior Court, City and County of San Francisco; William T. Wallace, Judge.

Action by Charles P. Willard against H. L. Tatum and Joseph J. Bowen to recover for goods sold. Defendants interposed a counterclaim. From a judgment in defendant's favor, and from an order denying a new trial, plaintiff appeals. Affirmed.

John H. Dickinson for appellant; Langhorne & Miller for respondents.

HAYNES, C.—Plaintiff is engaged in the business of manufacturing engines and other machinery in Chicago, Illinois, and the defendants are copartners doing business in San Francisco. Plaintiff brought this action to recover a balance upon book account, and also the amount of a promis-

sory note, due him from defendants for goods sold. There was no contest as to these claims, but defendants, by way of counterclaim, alleged, in substance, that prior to 1887 they purchased from plaintiff several "Davey Safety Engines"—one of four-horse power, for $430; four of two-horse power, for $255 each; and one of one-horse power, for $191.25—and paid for said engines $1,551.25; that they proved unsalable, and on April 27, 1887, defendants wrote plaintiff that these engines were "dead stock"; that they had sold but two, leaving on hand one four-horse power, three two-horse power, and one one-horse power; that they had ordered these engines relying on plaintiff's representations, and that the engines had not come up to them; and asking for a proposition under which they might return them; that plaintiff thereupon agreed by letter that if defendants would have the engines boxed and returned to him, freight prepaid, he would credit defendants the full amount they had paid for them. Afterward it was agreed they might be returned by vessel around Cape Horn and via New York. March 27, 1888, defendants shipped the engines, but included one more two-horse power engine than was named in the proposition. After they were shipped, and the vessel was at sea, and on receipt of the bill of lading, plaintiff wrote defendants, refusing to give credit for the engines, but offering to take care of them, and make the best disposition he could for defendants. This change of purpose was based on an alleged change in the patterns of the engines, made after the agreement to take them back, by which it was claimed the old style was not worth so much as before. The court found for defendants for the price of the motors (excluding the extra two-horse power engine not specified in the original proposition), less the amount of plaintiff's claim specified in his complaint, and gave judgment for defendants for $871.87 and interest. Plaintiff's motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

Appellant's contention that the evidence is insufficient to justify the findings cannot be sustained.

1. That an extra engine was shipped is true. But defendants did not make the return and acceptance of the others conditional upon the acceptance of it by plaintiff, nor was he charged with it by the court. The cases cited by appellant

do not sustain him. Stevenson v. Burgin, 49 Pa. 36, holds that a contract for a certain fixed quantity of merchandise, to be delivered on shipboard by the vendor, is not complied with by a tender of bills of lading for a larger quantity; and a demand of payment therefor at the price agreed on cannot be enforced by the vendor. Clark v. Baker, 11 Met. (Mass.) 186, 45 Am. Dec. 199, holds that it is the duty of the seller of a cargo of corn in bulk, part of which is damaged, to separate the good from the bad, and offer the good to the buyer. The corn was sold as of a certain quality, and the buyer could not be required to make the selection. In Brewer v. Railroad Co., 104 Mass. 593, the contract was for wood of a particular quality, and plaintiff delivered wood intermixed with that of an inferior quality. The court held that defendant would not be obliged to accept it. Croninger v. Crocker, 62 N. Y. 151, was a similar case, where wool of the quality contracted for was largely intermixed with inferior qualities. In the case at bar there was no difference in quality—simply one engine more than was embraced in the agreement. No separation or examination was required, as they were entirely distinct, each complete in itself, and no requirement was made that plaintiff should accept it. We know of no case which goes so far as to relieve plaintiff from accepting the others for that reason.

2. It is specified by appellant that the evidence further shows that defendants never did comply with the agreement, viz.: by "shipping and delivering the engines at Chicago." The court found that plaintiff received the engines, and that finding is not attacked. Besides, it may well be that defendants were relieved by the conduct of the plaintiff from a delivery at the place specified.

3. This specification is that the evidence shows there was no consideration for the agreement, and that nothing was done under it. Plaintiff answered defendants' cross-complaint, and did not allege that the agreement was without consideration. But, assuming that a denial of the agreement raised that question, we think the facts showed a good and sufficient consideration.

4. The most important question presented by appellant is whether the engines were returned within a reasonable time after the agreement was made. About eight months elapsed

after the mode of shipment was arranged before they were in fact shipped. "There is no precise standard of reasonable time. The true rule must be that that is a reasonable time which preserves to each party the rights and advantages he possessed, and protects each party from losses that he ought not to suffer": 2 Parsons on Contracts, 662. The question here involves the consideration of the relations and dealings of the parties, including the fact that defendants had, until after the time this agreement was made, the entire sale of plaintiff's manufactures on the Pacific coast, not on commission, but by purchase; that these engines had been paid for by defendants, and plaintiff still held and had the use of the money so paid; that no loss is shown to have accrued to the plaintiff by the delay; that plaintiff's objection to taking the engines under that agreement was not based on the fact of delay, but on the claim that after the agreement and before the shipment a change had been made in the pattern of the "Davey Safety Engine," which rendered the old make (these engines) less valuable; but on the trial this claim was abandoned. Some of these engines were in defendants' house at Portland, Oregon, and had to be brought to San Francisco; and defendants also gave evidence tending to show that they were shipped by the first vessel sailing to New York, carrying a miscellaneous cargo, of which they were informed. Evidence was given showing that other vessels, before the one by which the engines were shipped, cleared for New York, but it does not affirmatively appear that they carried miscellaneous cargoes. We think the question was one of fact, which would have been properly submitted to a jury under proper instructions from the court; that there is evidence sufficient to sustain the finding, and that it should not be set aside: See Luckhart v. Ogden, 30 Cal. 558–560.

No exceptions were reserved on the trial, and the errors of law specified are fully covered by the foregoing. The judgment is sustained by the findings, and therefore the court did not err in rendering judgment for defendants. We advise that the judgment and order appealed from be affirmed.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

WOODWARD et al. v. RAUM et al.

No. 14,779; January 11, 1893.

31 Pac. 930.

Partition—Real and Personal Property.—In an action for partition of real estate, with the buildings and personal property thereon, it is proper to order partition of the real property separate and apart from the personal property, where it does not appear that such course will greatly prejudice the owners.

APPEAL from Superior Court, City and County of San Francisco; W. T. Wallace, Judge.

Action for partition by one Woodward and others against one Raum and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

John B. Harmon for appellants; Estee, Wilson & McCutcheon and W. W. Cope for respondents.

PER CURIAM.—Appellants commenced this action for partition of the property known as "Woodward's Gardens," consisting of three parcels of land, with the buildings, structures, improvements, art gallery, museums, menagerie of wild animals, and other personal property. The contention of appellants in the court below was, and their contention here is, that the entire property, real and personal, constitutes one piece of property, of which a partition cannot be made without great prejudice to the owners, and therefore a sale of both the real and personal property should be made together. The court, however, found that a partition of said real property, separate and apart from said personal property, might be made without great prejudice to the owners, and decreed accordingly. Is that finding justified by the evidence? We think it is. There is some conflict in the evidence upon this question, i. e., witnesses differed in opinion as to whether the real estate would bring more if sold without the wild animals and other personal property or not. After a careful reading of the evidence on this question, we are not prepared to say that the evidence even preponderates against the finding of

the court below. If it had appeared to that court that a partition could not be made without great prejudice to the owners, a sale might have been ordered: Code Civ. Proc., sec. 752. But it did not appear to the court below, and does not appear to us, that a partition cannot be made without great prejudice to the owners; and the owners themselves appear to be equally divided upon this question.

Judgment and order affirmed.

DIXON v. PLUNS.*

No. 14,429; January 11, 1893.

31 Pac. 931.

Trial.—A Verdict Arrived at by Adding Together the amounts thought by each juror to be a just verdict, and dividing the sum by twelve, will be set aside.

Negligence—Tool Falling from Building.—While Plaintiff was Walking on the sidewalk of a public street, an employee of defendant, who was repairing a building overhead, let fall a chisel, which struck plaintiff on the head, inflicting a serious injury. Held, that this established a prima facie case of negligence on the part of defendant, and a nonsuit was properly denied.

APPEAL from Superior Court, City and County of San Francisco; Eugene R. Garber, Judge.

Action by Katie E. Dixon against William J. F. W. Pluns to recover damages for personal injuries inflicted through the alleged negligence of an employee of defendant. From a judgment for plaintiff, defendant appeals. Reversed.

H. C. Firebaugh for appellant; Nagle & Nagle for respondent.

GAROUTTE, J.—Respondent, while walking upon the sidewalk of Larkin street, in the city of San Francisco, was struck

*For subsequent opinion in bank, see 98 Cal. 384, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 Pac. 268.

upon the head, and quite seriously injured, by a chisel which fell from a scaffolding above, upon which one of the appellant's employees was standing while engaged in affixing a cornice to the building. Damages were recovered in the lower court, and this appeal is from the judgment and order denying a new trial.

Appellant moved for a new trial upon the ground of misconduct of the jury, in this: that they arrived at their verdict by a resort to the determination of chance. The code expressly provides that such misconduct may be shown by the affidavits of jurors (Code Civ. Proc., sec. 657); and, in support of the motion, appellant presented the affidavit of one Koster, a juror, wherein he stated "that, upon retiring to the jury-room, the twelve jurors first agreed by a vote that the average sense of the jurors should control in arriving at what the verdict should be, and then the twelve jurors agreed to be controlled by their vote, and voted that the said average sense of the jurors should be arrived at in the manner following, namely, by each individual juror writing on a piece of paper what he would fix the verdict at, and that the sums so written should then be added together, and the aggregate divided by twelve, and that the amount resulting should be taken as the average sense of the jurors, and be put in the verdict accordingly; and thereupon said plan was carried out," etc. Courts have not been astute in perceiving sufficient error to set aside verdicts upon the grounds here relied upon, and evidence sustaining the verdict has been generally favored; but upon this motion no opposing affidavits were offered, and the merits of the contention rest alone upon the sufficiency of the statement of facts above recited. Reduced to its lowest terms, the affidavit plainly discloses that the verdict was the result of a previous agreement, and was arrived at upon the basis that the amount of the verdict should be the quotient resulting from a division wherein twelve was the divisor, and the sum of the various amounts thought to be a just verdict by the respective jurors the dividend. The calculation was made in pursuance of a prior agreement that the result should be the verdict; and that result was adopted as the verdict, not upon further consideration of the jury, and upon the determination that such amount formed a just and proper verdict, but it was adopted in pursuance of the prior "agreement." The de-

cisions of our courts clearly indicate that they do not countenance such procedure, and the verdict must be set aside. This question is reviewed, and the authorities collated, in the recent case of Pawnee etc. Improvement Co. v. Adams, 1 Colo. App. 250, 28 Pac. 662, where it is said: "As well put in one case, 'it substitutes the fluctuation and uncertain hazards of the lottery for the deliberative conclusions of their reflections and interchange of views.' " It was said by this court, in Turner v. Water Co., 25 Cal. 397: "To ascertain this average, the jury may properly adopt the method which was used in the present case, but they ought not to agree to be bound by the result, whatever it may be. If they do so agree, and such result is made the verdict without further consideration or assent, such verdict is vicious and irregular, and must be set aside whenever the fact is made to appear by proper and competent evidence." This language is quoted with approval in the recent case of Hunt v. Elliott, 77 Cal. 591, 20 Pac. 132. In that case it was held that the affidavit of the juror was insufficient in its statement of facts to defeat the verdict. The court failed to specifically indicate wherein the defects existed, and we now are unable to perceive them; but the judgment sustaining the verdict was clearly right upon the second ground stated, and might well have been supported upon that ground alone. As to the affidavit now under consideration, as already suggested, we are satisfied it presents a state of facts that demands a retrial of the case. As the cause must be returned to the lower court for further proceedings, we pass to an examination of some additional matters.

The motion for a nonsuit was properly denied. Upon the evidence we cannot say that the respondent was guilty of contributory negligence in walking upon the sidewalk at the time the injury was inflicted. She had a right to be there, and had no sufficient reason to anticipate danger from overhead. Respondent's evidence also established a prima facie case of negligence upon the part of appellant. Conceding the rules of evidence as between master and servant to be as intimated in Madden v. Steamship Co., 86 Cal. 448, 25 Pac. 5, still that case is not this case. Respondent was walking upon a public thoroughfare. An employee of appellant, while engaged in repairing a building overhead, let fall a chisel, which inflicted the injury. Those facts constitute a prima facie case, for the

presumption of negligence upon the part of the employee flows therefrom, and authorities are ample to support this principle of law. As to common carriers this doctrine is fully discussed and adopted in the case of Boyce v. Stage Co., 25 Cal. 460, where Chief Justice Sanderson said: "The argument places the burden of explanation upon the shoulders of the plaintiff, but, unfortunately for the argument, the law places it upon the shoulders of the defendant." This case was approved in Treadwell v. Whittier, 80 Cal. 583, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 Pac. 266, a case of injury by the falling of an elevator; the court holding that the rule applied to common carriers was equally applicable to the owner of an elevator. It is there said: "In this case the plaintiff was only called on to show that he was hurt by the breaking of the machinery of the elevator, by which he was injured. When this is done, he has made out a case on which, there being no other evidence introduced, he has a right to recover." The application of the principle of presumption of negligence from the facts and circumstances of the accident apply to the present case as entirely and fully as to the preceding citations. No sound reason can be advanced to the contrary. Upon principle there is no distinction. This question is carefully considered, and the authorities reviewed, in Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530. In that case the wall of a building fell upon a traveler in the street. The court held that a presumption of negligence arose from the fact of the building falling. In Lyons v. Rosenthal, 11 Hun, 46, the injury arose from the falling of a box of goods from the story above, and it was held that negligence would be presumed. In support of this doctrine the court cited various English authorities, which upon their facts stand upon common ground with the case at bar: See Kearney v. Railroad Co., L. R. 5 Q. B. 411; Byrne v. Boadle, 2 Hurl. & C. 722; Scott v. Dock Co., 3 Hurl. & C. 596. The true rule recognized by the authorities as pertaining to this class of accidents is: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care": Shearman and Redfield on

Negligence, sec. 60. Let the judgment and order be reversed, and the cause remanded for a new trial.

I concur: Paterson, J.

HARRISON, J.—I concur in the judgment of reversal upon the first point discussed in the opinion of Mr. Justice Garoutte. I also concur in holding that the court properly refused a nonsuit. But I do not concur in that portion of the opinion which holds that the liability of the defendant is to be determined by the same rules which determine the liability of common carriers of passengers. Their relation to a passenger is such that, upon the proof of an injury sustained by him while being carried, negligence is presumed, and the burden of exonerating itself from liability is thrown upon the carrier: Bush v. Barnett, 96 Cal. 202, 31 Pac. 2. In the present case, however, there was no contractual relation between the plaintiff and the defendant, and as the liability of the defendant is predicated solely upon his negligence, it was essential for the plaintiff to present some evidence tending to establish such negligence before she was entitled to recover: Wharton on Negligence, sec. 421. "It is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant": Thompson on Negligence, p. 1227. See, also, Cosulich v. Oil Co., 122 N. Y. 123, 19 Am. St. Rep. 475, 25 N. E. 259; Huff v. Austin, 46 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 864.

When the plaintiff rested her case she had, however, presented sufficient evidence to establish a prima facie case of negligence on the part of the defendant. She was, at the time of receiving the injury, traveling upon the public highway—a place in which she had the right to be—and the defendant was engaged in the lawful occupation of constructing a building fronting upon the street. While thus engaged, he was compelled, more or less, to obstruct the free use of the street; but as this obstruction was for his own convenience, and was an interference with the rights of others, it imposed upon him the duty of exercising such care and caution in the performance of his work as would not interfere with the safety of those who had the right to use the street; and any omission

Green, his wife, commenced April 1, 1872, the attachment being levied upon the realty the following day. Judgment was rendered for McCombe November 5, 1880, and the lands were sold under execution thereon December 10, 1881, to one Forbes, and certificate of sale issued to him upon the same day. Upon the fourth day of June, 1887, the ex-sheriff of San Mateo county, who made the sale, executed a deed of the premises to respondent, who held the certificate as an assignee thereof. This action was commenced June 8, 1887. Appellant, as appears by his evidence, relies upon three defenses to defeat respondent's cause of action: (1) Title under a deed from said Green, dated August 17, 1872; (2) title by adverse possession, based upon an entry made under the aforesaid deed; and (3) outstanding title in a stranger.

1. A sheriff's deed takes effect from the date of the levy of the attachment, if the levy is such as to create a lien; Porter v. Pico, 55 Cal. 165. Upon an examination of the evidence we are satisfied that a valid levy was made; and it follows that respondent's title, under his deed of June 4, 1887, took effect as of the date of the attachment, to wit, April 2, 1872, and that appellant's deed from Green, dated August 17, 1872, carried no title.

2. Appellant failed to acquire title, as against Robinson, by adverse possession. Robinson had no right of entry, and therefore no cause of action until he received the sheriff's deed, and his complaint was filed within a short time subsequent to that event. The statute of limitations did not begin to run against him until his right of entry accrued. In Jefferson v. Wendt, 51 Cal. 573, this doctrine was declared; and, upon the ground that it had established a rule of property, it was followed in Leonard v. Flynn, 89 Cal. 536, 23 Am. St. Rep. 550, 26 Pac. 1097. The adjudications of the courts of Illinois declare the statute of limitations in this character of action to begin to run from the date when the purchaser at the execution sale is entitled to his deed, and not, as in this state, from the date of the actual delivery thereof. This view was taken in Pratt v. Pratt, 96 U. S. 704, 24 L. Ed. 805, and seems to have sound reason in its support, but the rule is to the contrary in this state. It must be remembered that this appellant did not enter upon the land with bow and spear, defying the world. He entered under a deed from Green, the judg-

ment debtor, and, in effect, respondent's grantor, and is now claiming color of title under such deed. Respondent had no right of entry during these years that appellant was in possession; neither did Green, respondent's grantor, for whatever interest he possessed he conveyed by deed to appellant. Hence there was no right of entry in anyone, and therefore there was no person entitled to oust appellant. It would be a novel principle to declare a title by adverse possession against the respondent, holding a perfect legal title, when neither he, his predecessors nor grantors, were entitled to bring an action to recover possession of the realty during the period of incubation of this new title. The principle upon which the statute of limitations is founded is the laches of the true owner in sleeping upon his rights, but there can be no laches when there are no rights to be protected. It was said by Mr. Justice Miller in Pratt v. Pratt, 96 U. S. 707, 24 L. Ed. 587: "The defendant, having purchased the land of the person who had the legal title, does undoubtedly hold adversely to everybody else. He admits no better right in anyone. He is no man's tenant. The right by which he holds possession is superior to the rights of all others. He asserts this, and he acts on it. His possession is, in this sense, adverse to the whole world. But it is not inconsistent with all this that there exists a lien on the land—a lien which does not interfere with his possession, which cannot disturb it, but which may ripen into a title superior to that under which he holds, but which is yet in privity with it. In the just sense of the term his possession is not adverse to this lien. There can be no adversary rights in regard to the possession under the lien, and under the defendant's purchase from the judgment debtor, until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff; and then, with the right of entry in plaintiff, the bar of the statute begins to run."

3. For the purpose of showing outstanding title, appellant proved that the common grantor, Green, had mortgaged the premises to certain parties, who had foreclosed the mortgage, and sold the realty under such foreclosure, prior to the date of the McCombe attachment, and that one Ford was the owner of such title at the inception of this action. In rebuttal, respondent introduced a deed showing that whatever title Ford

may have had at the commencement of the action was then vested in him. The admission of this evidence was clearly correct. It was not offered for the purpose of showing title in respondent, but to rebut the fact that any outstanding title then vested in Ford. The appellant in no manner connected himself with Ford's title, and under such circumstances the defense of outstanding title is overcome by proof that since the beginning of the action such title has ceased to exist. An outstanding title sufficient to defeat plaintiff in ejectment must be outstanding at the time of the trial of the action: Sedg. & W. Tr. Title Land, sec. 831. Appellant insists that he connected himself with Ford's title "by acquiring it by adverse possession." Adverse possession for the statutory period creates a title, but does not operate to transfer the title of the disseisee to the disseisor: Williams v. Sutton, 43 Cal. 65; Alhambra etc. Water Co. v. Richardson, 72 Cal. 608, 14 Pac. 379. If respondent had received a deed of this realty from Green at the date of the levy of the McCombe attachment—except as to the statute of limitations—he would have been in a position to have successfully prosecuted this action to final judgment, upon the facts as they appear by the record. The final result of the attachment proceedings was a deed to respondent, vesting in him all the title to this realty that Green had at the date of the levy. Such being the fact, respondent must prevail, for the defense of the statute of limitations cannot be maintained.

Respondent's deed from the ex-sheriff, taken in connection with the proceedings in the action of McCombe v. Green et al., upon which the deed was based, made a prima facie case of title in his favor; and as we have already seen, that prima facie case is too strong to be repelled by any attack that can be launched against it by the defenses which are used by appellant for that purpose. Let the judgment and order be affirmed.

We concur: Harrison, J.; Paterson, J.

LIGHT v. RICHARDSON.

No. 19,072; January 13, 1893.

31 Pac. 1123.

Continuance—Absence of Parties.—Defendant and His Witnesses were present at the time fixed for trial, but his attorney was absent from sickness. The court stated that the case would be continued on that account, and the defendant and his witnesses left without instructions as to future attendance. The next day the attorney was still sick, and the defendant and his witnesses did not appear. A motion for continuance was denied. Held, that the absence of defendant and his witnesses was excusable, and the continuance should have been granted.

Continuance—Absence of Witnesses—Affidavit.—Code of Civil Procedure, section 595, which provides that "the court may require the moving party, where application is made on account of the absence of a material witness, to state on affidavit the evidence which he expects to obtain," is not imperative, and should not be required of counsel when he cannot be aided in making the affidavit by his client, who is excusably absent.

APPEAL from Superior Court, Los Angeles County; W. P. Wade, Judge.

Action by W. R. Light against E. W. Richardson. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Willis & Appel and Walter F. Haas for appellant; H. L. Valentine and Del Valle & Munday for respondent.

HAYNES, C.—The defendant appeals from a judgment rendered against him, and from an order denying a new trial. The facts are presented in several bills of exceptions.

The cause was set for March 3, 1892, in the superior court, and was on the calendar for trial. The defendant's attorneys were Messrs. Willis & Appel, and on that day Mr. Willis was absent from the county on business, and Mr. Appel was unable to be present on account of sickness. The defendant was present with his witnesses, and ready for trial but for the absence of his attorney. Another cause was then on trial,

and, in answer to an inquiry made by plaintiff's attorney, the court stated "that the case would not be reached, and, if reached, it would have to be continued on account of the sickness of Mr. Appel." The defendant and his witnesses soon after left the courtroom, and, owing to the illness of one of his attorneys and the absence of the other, received no instructions in regard to their future attendance. On the morning of March 4th, Mr. Appel being sick still, Mr. Willis moved the court for a continuance of the cause upon his own affidavit. The affidavit, in addition to the facts above mentioned, alleged that the case had been in Mr. Appel's charge; that it was understood and agreed between the firm of Willis & Appel and the defendant that Mr. Appel should try the case; that Mr. Appel had prepared it, and in consequence he (Mr. Willis) had given only a casual attention to it, either as to the law or the facts; that he had no opportunity of communicating with the defendant or his witnesses; that defendant was not notified to be in court on that day, and that he did not know where he was. The continuance was denied, and defendant excepted.

Without deciding the question whether the absence of Mr. Appel, who had charge of the case, and who, as appeared from the affidavit above mentioned, by agreement with the client was to try the case, would have entitled the defendant to a continuance, we think the absence of the defendant and his witnesses under the circumstances was excusable, and that the continuance should have been granted. The defendant was informed by the statement of the court that his attorney upon whom he relied was sick; that if the case should be reached that it would have to be continued for that reason; and, in the absence of the other member of the firm, we do not think it strange that he inferred that it would not be tried until Mr. Appel should recover from his sickness, and that he would be notified by his counsel of the time of trial. But, on the contrary, his presence with his witnesses at the time fixed for trial was sufficient evidence that his absence on the next day was attributable to some other cause; and that cause, we think, should have been attributed to the defendant's mistake of what was implied by the statement of the court in reference to a continuance of the case. It is clearly the intention of the code, while protecting the court from

imposition and unnecessary delays, to secure a reasonable opportunity to litigants to try their causes on the merits, to the end that justice may be done; and while no definite rule can be laid down, embracing all the different circumstances under which continuances should be granted, this spirit and intention of the code, which is especially manifested in section 473, Code of Civil Procedure, should always be borne in mind; for this much, at least, is certain: That, where the circumstances are such as would authorize the court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, surprise, or excusable neglect, a continuance should be granted.

In respondent's brief some defects in the affidavit for continuance are pointed out. It is said that no merits are shown, and that the facts expected to be proved by the witnesses are not stated. It should be considered, however, that the affidavit was made by counsel not familiar with the details of the case, in the absence of his client, and that the pleadings were verified. We think that about all that Mr. Willis could have said, without subjecting himself to the charge of recklessness, was stated in his affidavit; and, besides, no objection appears to have been made to the affidavit upon these grounds upon the hearing of the motion for continuance. As to stating what is expected to be proved by absent witnesses, the language of the code is that "the court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain": Code Civ. Proc., sec. 595. This requirement is not imperative, and certainly should not be made of counsel when he cannot have the aid of his client, if the absence of the client is excusable.

Other questions raised by appellant on his motion for a new trial need not be considered. We think the court erred in not granting the continuance, and that the judgment and order denying a new trial should be reversed and a new trial granted.

We concur: Belcher, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial granted.

BOYD v. BOYD.

No. 19,046; January 14, 1893.

31 Pac. 1108.

Divorce—Division of Community Property.—In an action for a divorce it is not an abuse of discretion for the trial court to set off to plaintiff the homestead and a small amount of personalty from the community property, leaving to defendant all other community property; section 146, subdivision 1, Civil Code, providing: " . . . . The community property shall be assigned to the respective parties in such proportion as the court, from all the facts of the case and the condition of the parties, may deem just."

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action for divorce by S. J. Boyd against E. H. Boyd. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones & Carlton for appellant; Holloway & Kendrick for respondent.

FOOTE, C.—This appeal was taken from a judgment in favor of the plaintiff and from an order refusing a new trial. The appeal from the order has been dismissed by the appellate tribunal, and the matter now stands on an appeal from the judgment alone. This appeal was not taken within sixty days from the rendition of the judgment, so that no exception to the decision on the ground that it is not supported by the evidence can be considered. The findings must therefore be held to be supported by the evidence. The appellant contends, however, that the findings are insufficient. The findings are general, viz.: That all the allegations of the plaintiff's complaint are true; that all the allegations of the answer of the defendant, and of the averments thereto, are untrue and false, except the admissions contained in allegations 1 and 2, viz., that the parties were married as alleged in the complaint, and are husband and wife; and that the issue of said marriage was correctly stated in that pleading. Such findings have often been held to be sufficient: Richards v. Shear, 70 Cal. 186, 11 Pac. 607.

It is further claimed by the defendant and appellant that the court abused its discretion in awarding property to the plaintiff. The decree, which follows the findings and conclusions of law, does not show such to be the fact, and we have nothing to do with the evidence in the case. The court seems, by the decree, to have set aside to the plaintiff, "the innocent party," the homestead taken from the community property, which is subject to a mortgage of $5,000, and a small amount of personal property, leaving to the defendant all other property heretofore owned by the parties as community. This is in accordance with the legal power of the trial court in a proper case, under section 146 of the Civil Code, subdivisions 1 and 2.

As to the other questions discussed by the appellant, it is sufficient to say that by the dismissal of the appeal from the order denying a new trial they are not before the appellate court for consideration. We perceive no prejudicial error in the record, and advise that the judgment be affirmed.

I concur: Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed; and, it appearing to the court that this appeal is without any merit whatever, and has been prosecuted for delay, it is ordered that to the judgment against defendant be added the sum of $100 costs.

YBARRA v. SYLVANY.

No. 19,102; January 14, 1893.

31 Pac. 1114.

Quieting Title—Finding of Fact or of Law.—In an action to quiet title, a finding that plaintiff is the owner in fee and entitled to the possession of the described parcel of land is a finding of an ultimate fact, and not a conclusion of law.

Quieting Title—Pleading Bar to Action.—Where defendant pleads that the action is barred by certain specified sections of the Code of Civil Procedure, a finding that plaintiff, at the time of com-

mencing the action, was under the age of twenty-three years, and his cause of action is not barred by either of the sections pleaded, is sufficiently specific.

Quieting Title—Capacity of Plaintiff—Findings.—Where defendant does not raise the objection that plaintiff has not legal capacity to sue, a finding that plaintiff was under twenty-three years of age at the time of commencing the action is not objectionable on the ground that he may have been under twenty-one years of age, and is sufficient.

Quieting Title—Repayment of Money Paid Under Void Deed.—Where defendant claims under a void guardian's deed, and sets up no claim for repayment of money paid, and it does not appear that he paid any for the land, a judgment quieting the title in plaintiff is not erroneous, though no tender of repayment is made.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Candelario Ybarra against Stephen Sylvany to quiet the title to a certain parcel of land. From a judgment for plaintiff and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Dameron & Van Schrever for appellant; Moye Wicks for respondent.

BELCHER, C.—This is an action to quiet the plaintiff's title to a parcel of land in the city of Los Angeles, and the complaint is in the usual form. The defendant, by his answer, denied all the averments of the complaint; denied that he had no right, title, or interest in or to the land; and alleged that he was the owner thereof in fee simple, and was such owner and entitled to the possession of the land when the action was commenced; alleged that he had been in the quiet and peaceable possession of the premises described, holding and claiming the same adversely to the plaintiff and all other persons, for more than five years before the commencement of the action, and that the plaintiff's cause of action was barred by the provisions of sections 1806 and 318 and 319 of the Code of Civil Procedure. He then set out the facts in a cross-complaint and asked that his title be quieted as against the plaintiff. After trial the court below found that the plaintiff "is now, and for a long time hitherto has been, the

owner in fee and entitled to the possession of" the parcel of land described in the complaint; that the defendant claims an interest in and to the said land, but his claim is without right, and he has no right, title, or interest therein, or in any part thereof; that the defendant was in the quiet and peaceable possession of the premises described, and claiming the same adversely to the plaintiff and all other persons, for more than five years before the commencement of the suit, but during all that time the plaintiff was the owner and entitled to the possession thereof; that, at the time defendant entered upon said premises, plaintiff was a minor, and defendant entered thereon "under a pretended purchase thereof at an irregular and erroneous and insufficient and void guardianship sale, made in the matter of the estate and guardianship of this plaintiff, and this defendant has never had any title to the said premises or any part thereof, save such title as he claimed to have under the said worthless and void guardianship deed of conveyance"; that plaintiff at the time of commencing the action was under the age of twenty-three years; and that his cause of action was not barred by either of the sections of the code pleaded in bar thereof. Judgment was accordingly entered quieting the plaintiff's title, in accordance with the prayer of his complaint. Defendant moved for a new trial, which was denied, and then appealed from the judgment and order. No bill of exceptions or statement of the case is brought up in the transcript, and therefore only such questions can be considered as arise upon the judgment-roll.

In support of the appeal it is claimed that the findings as to the plaintiff's ownership and right to the possession of the premises in controversy were mere conclusions of law, and therefore insufficient to justify the judgment. This claim cannot be sustained. Finding No. 1 was to the effect that the plaintiff is the owner in fee and entitled to the possession of the described parcel of land. This was a finding of the ultimate fact, and not of a conclusion of law, and was sufficient: Murphy v. Bennett, 68 Cal. 528, 9 Pac. 738; Daly v. Sorocco, 80 Cal. 367, 22 Pac. 211.

It is further claimed that the findings upon the issues raised by the plea of the statute of limitations were simply conclusions of law, and insufficient. The defendant pleaded the statute by alleging that the cause of action was barred by

VANCLIEF, C.—Action to quiet title to a lot of land situate in the city of San Diego. After the close of the evidence in chief on the part of the plaintiff the counsel for the defendant moved a judgment against the plaintiff, and the appeal is from this judgment upon the judgment-roll, including a bill of exceptions.

The complaint is in the usual form, and the answer denies plaintiff's alleged title. The complaint describes the land in question as follows: "The west eighty (80) acres of Pueblo lot numbered one thousand two hundred and fifty-eight (1258) according to the Pasco map of the city of San Diego"; and it is admitted that the city of San Diego was the owner of this lot on the twelfth day of February, 1889, and that both parties claimed title from that city. As evidence of her title the plaintiff introduced a deed to her from the city of a lot described as follows: "Situate in the said city, and more particularly described as follows: Being that lot of land containing 80 eighty acres, and situate north of and immediately adjoining the 80 eighty acre lot granted to May Pollock, in consideration of and for a lot of land sold by former trustees, which good and sufficient reasons were shown belonged to Mary A. Israel, according to the official map of the said city made by Charles H. Poole, A. D. 1856, and on file in the office of the secretary of said board" (of trustees of the city). It will be observed that this description by no means identifies the lot described as that described in the complaint. It does not describe it as being numbered; nor does it refer to the Pasco map, for the reason, doubtless, that the Pasco map was not made until May, 1870, more than a year after the deed was executed.

For the purpose of applying the description to the lot in question the plaintiff introduced the Poole map referred to; but it appeared, and is admitted, that the Poole map does not include any part of the lot numbered 1258 on Pasco's map. For the same purpose the plaintiff attempted to prove the location of the lot said to have been granted to May Pollock, but failed to prove any grant to Pollock, or that Pollock ever possessed or claimed any land south of, or adjoining, lot 1258, as located on Pasco's map. The only evidence relating to a grant to Pollock are the following entries in official books of the city:

"San Diego, Jan. 21, 1869.

"To the Honorable Board of Trustees:

"I beg leave to ask your honorable board for eighty acres N. W. 1,773, and your petitioner will comply with the conditions imposed in like cases.

"MAY POLLOCK."

Indorsed: "Petition of May Pollock."

In another book was the following:

"No. 212. Date, Jan. 21, 1869. Name of applicant, May Pollock. Description, 80 acres N. W. 1,773."

There is no evidence that any action was ever taken upon this petition other than to file it and make the above entry. These acts evince no official recognition of the description in the petition as a correct or intelligible description of any land belonging to the city, and without extraneous aid the description is unintelligible. The only extraneous evidence which can be claimed to touch it is that there is a lot on each of the maps above named numbered 1773, but very different in shape, and apparently different in area. The maps appear to be on different scales, though no scale or point of compass appears on the copy of either in the transcript. On the Pasco map, lot No. 1258 adjoins one side of No. 1773 (probably the northern side), but the junction extends only about one-half the length of lot 1773, while the other half of the same side is bounded by lot numbered 1257 on the Pasco map; but neither of the lots numbered, respectively, 1257 and 1258, is laid down on the Poole map. From all this I think nothing more definite than a very hazardous guess can be arrived at, even as to the intended location of the eighty acres petitioned for by Pollock.

Plaintiff next attempted to prove a subsequent grant which she says was made for the purpose of amending the description of the land intended to be conveyed by the aforesaid grant of February 12, 1869, and for this purpose read in evidence the following resolutions of the city's trustees, passed at a regular meeting December 8, 1870:

"Resolved, that eighty acres of land out of Pueblo lot (western part) No. 1,258 be deeded to Mrs. Mary A. Israel, the same land having been sold to her February 19, 1869, by

a former board, and deed given without a proper description of the land.

"JAMES McCOY,
"A. B. McKEAN, Secretary."

James McCoy testified that the above is his signature, and that he was one of the city trustees at the time the resolution was adopted; that as one of the trustees he signed and acknowledged a deed pursuant to that resolution, which passed out of his hands, and he did not know what became of it. He did not deliver the deed, as others were to sign it with him. Supposes the deed was drawn by the secretary in whose office he signed it, and that, if it was executed by the other trustees, and delivered, it must have been delivered by the secretary. D. K. Israel, husband of the plaintiff, testified that Judge Hayes was attending to the matter for his wife; that witness had delivered the old deed to him with other papers pertaining to the matter; and that Hayes had died about ten years before the trial. The testimony of this witness further tended to prove that, if the deed had been delivered at all, it might have been delivered to Hayes for his wife, and that diligent search had been made for it without success. It appeared that the alleged second deed was never delivered by any person directly to plaintiff, and that neither she nor her husband ever saw it or had actual possession of it; but no offer was made to prove its contents as to description of the land, or otherwise, except as above stated. D. K. Israel testified that by his order a survey had been made for his wife of the "west eighty acres of Pueblo lot 1258," but he did not remember when, nor is there any evidence as to the boundary lines by that survey. He further testified that he had paid taxes for his wife on "west half of lot 1258" for twelve years between 1872 and 1887, and that all the receipts therefor were in his name, except two, which were in the name of his wife. It appears that these receipts were put in evidence, but the record contains no copies of them, and it does not appear to whom the lot was assessed. The plaintiff was never in possession of any lot which she claims to have purchased from the city, and never improved any such lot. The only evidence of payment of any consideration for the lot claimed is a ledger entry as follows: "1869. Dr. Mary A. Israel. Feb. 18. To 80 acres N. of Pollock's, $1.00." "Cr. Feb.

18. By cash in full, $1.00." I think the deed of February 12, 1869, is void for uncertainty in its description of the land, and that the evidence has no substantial tendency to prove that the alleged second deed was ever executed by the board of trustees of the city, and would not have justified a finding to that effect. One member of the board could not have executed such a deed: See acts creating and incorporating this board of trustees, approved January 30 and April 28, 1852 (Stats. 1852, pp. 223, 225). It follows that the plaintiff was properly nonsuited and that the judgment should be affirmed.

We concur: Belcher, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

MAIN ST. SAV. BANK & TRUST CO. v. HINTON, City Assessor.

No. 14,878; January 18, 1893.

32 Pac. 6.

Savings Banks—Taxation.—The Fact That a Corporation is engaged in a general banking business, in addition to a savings bank business, does not exempt that part of its business done as a savings bank from taxation under the laws applying to other savings banks.

APPEAL from Superior Court, Los Angeles County; William P. Wade, Judge.

Action by the Main Street Savings Bank and Trust Company against J. W. Hinton, city assessor of the city of Los Angeles, to recover taxes alleged to have been illegally assessed against plaintiff's property, and collected by defendant. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland for appellant; C. McFarland for respondent.

HAYNES, C.—This action was brought by appellant to recover from the defendant the sum of $1,075.59, the tax assessed and collected by seizure upon its solvent and unsecured credits. A demurrer was interposed to the complaint, which was sustained, and judgment rendered thereon for defendant, and plaintiff appeals. This cause is submitted upon the briefs filed in Security etc. Trust Co. v. Hinton, the same defendant, 97 Cal. 214, 32 Pac. 3 (No. 14,877, this day filed), and involves the same questions, and an additional one, which we shall briefly notice. It is claimed in this case that appellant does a general banking business, as well as that of a savings bank. We do not see that this fact materially affects any question decided in 14,877, or the correctness of the judgment rendered in this case by the superior court. So far as its general banking business is concerned, appellant is subject to the same law, as regards taxation, as other banks not doing a savings bank's business; and, as to that part of its business done as a savings bank, it is subject to the same law that applies to other savings banks. There should be no difficulty in separating its ordinary deposits from its savings deposits, though none is found in its statement to the assessor, or in the complaint in this action. In paragraph 20 of the complaint, it is alleged that the unsecured debts due from appellant to bona fide residents of this state were debts "due depositors for sums borrowed from them upon interest"; and, that being true, no distinction can be made between this case and that of the Security Savings Bank (No. 14,877), and the judgment should therefore be affirmed.

We concur: Belcher, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

FIRST NAT. BANK OF SANTA MONICA v. KOWALSKY et al.

No. 19,049; January 21, 1893.

31 Pac. 1133.

Appeal—Presumption.—Where an Appeal is Taken from a judgment which recites that the motion for judgment was made on affidavit, and the record does not contain the affidavit, the supreme court will presume that it stated facts necessary to justify the judgment.

Appeal.—Where an Appeal Bond is Signed by One Ball as surety, but by a clerical error the judgment is against Bell, and the record shows the error and contains the data necessary to correct it, the error should be corrected by the trial court on motion of any party to the judgment.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by the First National Bank of Santa Monica against H. I. Kowalsky. There was a judgment for plaintiff, and defendant appealed. An undertaking was filed signed by E. H. Kowalsky and A. Everett Ball as sureties, and from a judgment against them, they appeal. Corrected and affirmed.

T. J. Crowley for appellants; R. R. Tanner for respondent.

VANCLIEF, C.—On January 26, 1891, the plaintiff obtained a judgment in the superior court of Los Angeles county against the defendant H. I. Kowalsky for the sum of $1,284.70, from which he appealed to the supreme court, and to perfect the appeal, and to stay execution of the judgment, filed with the clerk of the superior court an undertaking in the sum of $3,300, signed by appellants E. H. Kowalsky and A. Everett Ball as sureties. The undertaking expressed the conditions prescribed by sections 941 and 942 of the Code of Civil Procedure; among them the condition that, if the sureties did not pay according to the undertaking within thirty days after the filing of the remittitur from the supreme court in the superior court, "judgment might be entered on motion of plaintiff and respondent in plaintiff and respondent's favor

against the said E. H. Kowalsky and A. Everatt Bell, the sureties aforesaid, for such amount, together with the interest that may be due thereon, and the damages and costs that might be awarded against the defendant and appellant upon the said appeal." On October 12, 1891, the supreme court dismissed the appeal, and the remittitur was filed in the superior court on November 13, 1891. On January 13, 1892, plaintiff's attorney moved the superior court for judgment against the sureties on said undertaking for the amount of the judgment against H. I. Kowalsky, and judgment was accordingly rendered against E. H. Kowalsky and A. Everett Bell. The judgment thus rendered recited that "this matter came up regularly to be heard on the motion of attorney for plaintiff, the affidavit of E. J. Vawter, the judgment-roll in this case, the remittitur of the supreme court filed herein, the notice and undertaking on appeal on file herein, together with all the records and files in this case; and, it satisfactorily appearing to me" (here follows a recital of all the other facts above stated). No copy of the affidavit of Vawter appears in the transcript, and the omission of it is not accounted for. The sureties, E. H. Kowalsky and A. E. Ball, bring this appeal from the judgment against them upon the judgment-roll in the original cause, and the judgment against them, with its recitals as above stated.

1. Appellants contend that, "before a judgment can be rendered against the sureties on an appeal bond, it is necessary that an affidavit or petition (which fills the place of a complaint in actions generally) should be presented to the court and filed"; and that "there is nothing in the record here to show that the conditions of the obligations had not been fulfilled." Conceding, without deciding, that an affidavit or petition was necessary, the judgment recites that the motion for judgment was made upon the affidavit of Vawter (who may have been an officer of the corporation plaintiff). In the absence of that affidavit it must be presumed that it stated all the facts not shown by the other papers and records, upon which the motion appears to have been made, necessary to justify the judgment. Nothing is better settled than that the burden of showing error is upon appellant. The transcript does not purport to contain all the documents or papers upon which the motion was heard. The clerk does not so cer-

tify, but only that the documents and papers composing it are full and true copies of originals on file.

2. Appellants make the further point that "the judgment here is not against the sureties, but only against the surety E. H. Kowalsky"; but that "the record shows that the undertaking was given by E. H. Kowalsky and A. Everett Ball," while "the judgment is against Kowalsky and Bell." It is true that the record shows that the undertaking was given by Kowalsky and Ball, and that, by a clerical error in spelling, the judgment is against Kowalsky and Bell; but since the record shows the error, and contains all the means and data necessary to correct it, the error might and should have been corrected by the court below, on motion of any party to the judgment: Newton v. Hull, 90 Cal. 495, 27 Pac. 429. I think the cause should be remanded, with direction to the court below to correct the error in the judgment by substituting therein the name of A. Everett Ball for the name of A. Everett Bell, and also for the name A. Everatt Bell, and that as corrected the judgment be affirmed; and also that appellants pay the costs of appeal.

We concur: Belcher, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to correct the error in the judgment by substituting therein the name A. Everett Ball for the name A. Everett Bell and also for the name A. Everatt Bell, and that as corrected the judgment is affirmed; and also that appellants pay the costs of appeal.

TUFFREE v. BROCK et al.

No. 14,882; January 21, 1893.

31 Pac. 1134.

Trust.—Where, in an Action to Establish a Trust in lands, there is a substantial conflict in the evidence as to whether or not a certain person, one of defendants, in making a purchase of the lands, was the agent of plaintiff, a finding that he was not such agent will not be disturbed.

Trust—Action to Establish.—In Such Action a Witness Testified that after the purchase by such defendant the latter said he had paid a certain sum to bind the sale, and asked witness if he and a friend did not wish to take a part in it; that the next day they met at plaintiff's room, and heard that both made a claim to the land, and gave the idea up; that such defendant claimed the property for himself; and that afterward plaintiff claimed the property. Held, that it was not error to exclude evidence by such witness that he and his friend went to plaintiff's room for the purpose of acquiring an interest in the land from plaintiff on the assumption that he had an interest therein.

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by J. K. Tuffree against Alvan D. Brock and others to establish a trust in certain lands to which defendants hold title. From a judgment for defendants, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Smith, Winder & Smith, J. W. Swanwick and A. W. Hutton for appellant; John D. Bicknell, Brosseau, Hatch & Thomas, H. H. Appel, E. L. Campbell and King & Stauffey for respondents.

BELCHER, C.—The plaintiff brought this action to obtain a decree declaring that the defendant corporations hold the title to certain lands situate in the county of Los Angeles, and frequently spoken of in the record as "Timms' Point," in trust for him. It is alleged in the complaint that on and before June 9, 1887, one A. W. Timms was the owner of the lands in controversy in fee, and that shortly before that day plaintiff was desirous of purchasing the same, and employed as his agent for that purpose the defendant Brock, and advanced the money necessary for his expenses, or otherwise provided therefor, and sent him to San Pedro, the residence of Timms, for the purpose of effecting the purchase; that Brock, as such agent, accordingly entered into negotiations with Timms, and on June 9, 1887, consummated an agreement with him for the purchase of the property for the sum of $25,000—$100 payable in cash upon the execution of the contract, $9,900 payable on July 9, 1887, at which time the

deed was to be executed, and the balance to be secured by two promissory notes for $7,500 each, and a mortgage on the property, both notes bearing interest at the rate of ten per cent per annum, compounding semi-annually, if not paid, and one payable in one year and the other in two years after the date last mentioned; that Brock, for and on account of plaintiff, and with his moneys, paid to Timms the sum of $100 upon the contract, and though acting as the agent of plaintiff, and making the purchase for and upon his account he took the contract in his own name; that afterward the defendants Berner, Pearson, Stratton, Weller and Brock conceived the design of fraudulently obtaining the property under the contract, and repudiating the interest of plaintiff, and in pursuance thereof Brock executed assignments of interests in the contract to Stratton, Weller and others, but all of their interests were on or before July 9, 1887, vested in Berner, who on that day induced Timms to execute a deed of the lands to him, and to accept his notes and mortgage in pursuance of the contract; that Berner on the same day, for the purported consideration of one dollar, executed a deed of the property to Pearson; that Pearson afterward executed a deed for an undivided one-fifth of it to defendant Lafferty, and that Lafferty subsequently conveyed the said one-fifth interest to the defendant Davis; that on October 20, 1887, Pearson, Davis and Lafferty executed a deed of all the land to the defendant the San Pedro Harbor Dock and Land Association, and that this association, on April 23, 1888, executed to the defendant the Southern Pacific Railroad Extension Company a deed of two described portions of the land. It is further alleged that at and before the dates of all of the said conveyances the grantees therein had full and actual knowledge and notice of the facts before stated, and of the rights and interests of the plaintiff under the said contract; and also that plaintiff is ready, able, and willing, and offers to pay to the defendants, or such of them as may be entitled thereto, the money paid by them or by Berner as the consideration of a deed to him, and also to pay the amount of money secured by the said notes and mortgage when the same become due. The defendants, by their answers, denied substantially all the averments of the complaint. After trial the court found upon all the issues in

favor of the defendants, and rendered judgment accordingly. The plaintiff then moved for a new trial upon a statement of the case, and his motion being denied, appealed from the judgment and order.

The principal contention in support of the appeal is that the finding that Brock, in making the purchase from Timms, was not acting as the agent of plaintiff, was not justified by the evidence. It is admitted, however, that there was evidence directly tending to support this finding and all the other findings, but objected that it was not credible, and therefore ought not to have been believed and acted upon, in view of the stronger and more credible contradictory evidence introduced by the plaintiff. It is a sufficient answer to this contention to say that there appears to have been a substantial conflict in the evidence, and therefore, under the well-settled rule in such cases, the judgment cannot be disturbed on this ground. It is further contended that the court erred in one of its rulings upon the admission of evidence. One George Kerckhoff was called as a witness in rebuttal by plaintiff. He testified that, some days after the bargain with Timms, "Mr. Brock told me that he made a payment of one hundred dollars to bind the sale of the Timms property, and he asked me and another gentleman, a friend of mine, if we wanted to take part in it. The next morning we had a meeting at Mr. Tuffree's room in the Nadeau House, and then we heard that Mr. Brock made a claim for the property, and Mr. Tuffree made a claim for the property, and I didn't like the aspect of affairs, and we gave it up. We retired. Mr. Brock made a claim for the property for himself alone. . . . . Question. I understand you to say that both Brock and Tuffree claimed the property; was that what you said? Answer. No. Peck claimed it for himself alone. Q. Then you say that Tuffree claimed it? A. No. Tuffree claimed the property, but he had not done so before. He claimed the property afterward—after we saw him. Q. What did you go to see Mr. Tuffree for?" This last question was objected to by defendants, and counsel for plaintiff then stated: "We anticipate showing by the answers to the question that the parties went there for the purpose of acquiring an interest from Mr. Tuffree, and in pursuance of the assumption upon their part that Mr. Tuffree did have an in-

terest in the matter." The court sustained the objection, and the plaintiff excepted. We are unable to see any error in this ruling. If the witness had testified as counsel anticipated he would, the plaintiff's case would in no way have been strengthened or the defendants' weakened. The anticipated testimony was therefore wholly irrelevant and immaterial. No other points being made for a reversal, we advise that the judgment and order be affirmed.

We concur: Haynes, C.; Foote, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

DREW v. COLE et al.

No. 19,143; February 4, 1893.

32 Pac. 229.

Surface Water—Obstructing Natural Flow.—Where, from time immemorial, surface water had flowed through well-defined channels, from the adjacent country, upon plaintiff's land, and would still but for the erection by plaintiff of an embankment which diverted the water upon defendants' land, the fact that a change in the conformation of the adjoining country, resulting from its cultivation by strangers, had obliterated the natural channels, and formed new ones, which would cause the water to overflow defendants' lands but for an obstruction erected by strangers many years before such change, will not justify plaintiff in maintaining his embankment, to the injury of defendants.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Petition for injunction by H. L. Drew against Henry Cole and another. Defendants filed a cross-bill for affirmative relief. Judgment for defendants. Plaintiff appeals. Affirmed.

Willis, Cole & Craig and C. W. C. Rowell for appellant; Paris & Satterwhite, Rolfe & Freeman and Harris & Gregg for respondents.

HAYNES, C.—Plaintiff appeals from the judgment and an order denying his motion for a new trial. The action was brought to enjoin defendants from constructing a bulkhead or embankment by which, it is alleged, certain waters would be turned upon plaintiff's premises, to his injury. Defendants answered, and also filed a cross-complaint, seeking affirmative relief against the plaintiff. The findings of the court, upon all the issues, were in favor of defendants. The locus of the controversy is upon a subdivided portion of the San Bernardino ranch, northwesterly from the city of Redlands. Colton avenue runs east and west and California street crosses the avenue at right angles. The plaintiff's land lies on the north side of Colton avenue, and the land of defendants, Cole and Hicks, on the south side. California street is the east boundary of the land of the plaintiff and of defendant Hicks, and defendant Cole's land adjoins Mrs. Hicks' land on the west. The Adams or La Pierce land, mentioned in the testimony, lies on the south side of Colton avenue, and is separated from Mrs. Hicks' land by California street, and the land of William Curtis, mentioned in the testimony, lies on the west side of California street, and adjoins the land of defendant Hicks on the south. The lands of plaintiff and defendants, Cole and Hicks, are highly cultivated, and planted in orange, lemon, and other fruit trees and vines. The complaint alleges "That to the southeast of plaintiff's premises is a large section of country comprising what is known as the 'Old Barton Ranch' and 'Redlands,' all of which is cultivated and irrigated; and since the cultivation and irrigation of the same, and during heavy storms of rain, the water flows down from the same to the southeast corner of plaintiff's land, and has cut itself a channel down through said Colton avenue, running westward along plaintiff's south line, but outside and south of plaintiff's improvements, and is flowing thereon in greater or less quantities at different times." The complaint then charges that defendants are proceeding to build a bulkhead across Colton avenue, on the line of California street, for the purpose of preventing the water from passing down Colton avenue, and compelling it to pass over plaintiff's premises, to the great injury of his orchards and improvements, by cutting chan-

nels, etc. The answer alleges that during storms of rain, from time immemorial, the water has naturally flowed from the section of country mentioned in the complaint, in a northwesterly direction, to the southeast corner of plaintiff's land, and would still naturally flow in the same direction, upon and across plaintiff's premises, but for a dam or embankment constructed by plaintiff in the spring of 1890 across the natural course of said water, whereby it was diverted, and caused to flow down Colton avenue and over the defendant's lands; that the construction of the embankment being built by them, and the construction of which plaintiff seeks to enjoin, was necessary to prevent the diversion caused by plaintiff, and to protect their premises. Defendants' cross-complaint repeats these allegations, alleges that plaintiff threatens and intends to maintain his dam, and prays for an injunction, and that the dam may be abated as a nuisance. Plaintiff's answer to the cross-complaint denies specifically the material averments thereof, and alleges that about 1887, owing to the cultivation of the land lying to the southeast, large bodies of water were accumulated thereon for the purposes of irrigation, and ditches and canals were constructed; that by natural and artificial causes, over which he had no control, the conformation of the country lying southeasterly from his premises was so changed that ancient channels were obliterated, and new channels created, "and that the water since then coming through said channels will, if unobstructed, discharge itself over and through the place of William Curtis and the defendants in a northwest direction, and on through and over Colton avenue a long distance west of the southeast corner of his place"; and further alleges that defendants so graded California street, and constructed an embankment along the easterly side of said street, as to prevent the water from flowing as it otherwise would across their land, and that, if the water was permitted to flow as it naturally would across their land, the quantity would be insufficient to injure them. The court found (1) that all the matters and things stated in defendants' answer are true; (2) that plaintiff did, in the year 1890, erect a dam at the southeast corner of his land, with the intent and to the effect of diverting all of the water which flowed to said corner of his land through the natural

drains of the country, down Colton avenue, and thereby caused a large wash or gulch to be made in the avenue, and also caused said waters to run over the defendants' lands, and wash and injure and greatly damage the same, and that the water never flowed down Colton avenue before the erection of said dam by plaintiff; and, as to the cross-complaint, found all the allegations true, and all the denials and matters alleged in the answer thereto untrue. Judgment was rendered that plaintiff take nothing by his action, and upon defendants' cross-complaint judgment was entered that plaintiff's dam be abated as a nuisance. Appellant's notice of intention to move for a new trial specified, as the grounds thereof, (1) insufficiency of the evidence to justify the decision of the court; (2) errors of law occurring at the trial, and excepted to by the plaintiff; and (3) that said decision is against law. Under the second ground of motion above mentioned, there are no specifications whatever. Several particulars are specified wherein the evidence is claimed to be insufficient to justify the findings; but these, so far as material, hinge upon the question whether there was a natural channel or drainage which conducted the water to plaintiff's southeast corner, and thence into and upon his premises, and not down Colton avenue, or over the lands of defendants. The evidence is very voluminous, and every fact bearing on the issues between the parties appears to have been fully developed. Careful surveys of the country from which water flows to the vicinity of plaintiff's and defendants' lands were made, and topographical and profile maps were prepared to illustrate the various contentions of the parties and the testimony of the witnesses.

After a careful examination of the maps and the testimony of the witnesses, the principal issue of fact is not difficult of determination. It is somewhat obscured by the large mass of testimony, much of which is immaterial and sharply conflicting. Counsel for appellant concedes that "it is in evidence, and not contradicted, that at some time in the past a dry gulch ran down through these places to the southeast corner of plaintiff's place." Plaintiff's answer to the cross-complaint would seem to show quite conclusively that such dry gulch existed until about 1887, when, by the improvement and cultivation of the land, "the conformation of the

country lying to the southeast" was changed by natural and artificial means; that old channels were obliterated and new ones created; and that "the water since then coming through said channels will, if unobstructed, discharge itself over and through the places of William Curtis and the defendants, Cole and Hicks." The change in the conformation of the country, and the obliteration of the old channels, and the creation of new ones, were not upon defendants' lands, nor caused by them. Defendants' map shows, and there is much evidence tending to establish the fact, that the main gulch or arroyo came down from at or near the city of Redlands, and entered the Adams or La Pierce lot near the middle of the east line, and pursued its course to the southeast corner of plaintiff's land, and continued in the same general direction for some distance into plaintiff's lands, where it spread out into what one of the witnesses termed "a swale." Another arroyo, but a smaller one, came into the Adams lot on the south side, and continued across the lot, and entered the main gulch near the point where it left that lot and entered plaintiff's premises. California street, as before stated, runs north and south on the west line of the Adams place and the east line of Mrs. Hicks' land. On the west line of the street is an embankment, averaging about three feet higher than the level of the cultivated land. This embankment was made twenty-one years ago for the purpose of a fence, by digging a ditch, and throwing the earth up on one side, and this embankment is about a foot higher than the present grade of California street. It does not appear, however, that at the time this embankment was made, nor until recent floods, the water would have flowed over the land of the defendants, nor that it would now have any material effect, but for the changes made in the surface of the lands above, whereby the ancient channels have been obliterated to a greater or less extent. Appellant relies very largely upon his topographical survey to show that the natural flow of the water would now be over defendants' land. That the natural flow would be at right angles to the contour lines is true, and would be conclusive upon that point if the surface were absolutely even and regular, but slight obstacles lying between the contour lines may divert the water from the course it would otherwise pursue.

But such evidence cannot overcome or change the course of natural channels conceded to exist or to have existed. Besides, these surveys were made shortly before the trial, and after the changes in the surface of the lands referred to by appellant in his pleadings and testimony, and for these changes the defendants are not responsible; nor are they responsible for the increased quantity of water reaching the east line of plaintiff's and defendants' property, resulting from clearing the lands above them, and the increased use of water for the purpose of irrigation, the breakage or overflow of ditches, and the like. So far as the arroyos across the Adams place, if they had remained unobstructed, would have conveyed the water, as they formerly did, to appellant's southeast corner, and into his land, he is not injured by the same quantity of water being now turned to the same point by the grading up of California street, or by the embankment maintained by Mrs. Hicks; nor could the defendants in any manner be held responsible for the acts of the public authorities in grading the street, so far as that may, under present circumstances, operate to turn the water to plaintiff's corner. But no relief was sought against those who changed the surface of the land above, so as to change or divert the course of the water, or through whose agency the quantity of the flow was increased, nor against the public for raising the grade of the street, nor against Mrs. Hicks for maintaining an embankment made many years before; for, if the defendants could be held liable for all this in an appropriate action, it could not change the result in this action. Appellant erected a dam across what is conceded to be at that point a natural channel, and which at some time in the past was the continuation of a natural channel or drainage for storm water from the city of Redlands to that point; and by the erection of the dam, and the removal of earth from that part of Colton avenue next his premises, appellant diverted the water into a new channel, to the injury of the avenue and of defendants' premises. So far, therefore, as the judgment against appellant is concerned, the material facts necessary to support it, so far as the existence of the watercourse, the erection of the dam, and the diversion of the water down the avenue were concerned, could have been sustained upon his own testimony, while the in-

jury to defendants resulting therefrom, as testified to by them, was practically uncontradicted; and the same facts found from the same evidence justified the dismissal of the plaintiff's bill for an injunction.

Appellant complains that there was no finding upon the allegation that not more than 2,500 inches of water naturally flowed at the point where the channel entered his land. But it is immaterial whether the quantity naturally flowing there was 500 or 2,500 inches. If any material quantity—that is, any quantity capable of doing damage to others if diverted—naturally flowed there, he had no right to obstruct it, and divert it to other and new channels, to the injury of others; and hence the quantity diverted, within the limits above stated, could not affect the character of his dam as a nuisance. I think the findings cover all the material issues, and are fully justified by the evidence, and that the findings support the judgment.

Some exceptions to evidence are found in the body of the transcript, but which are not referred to in the specifications of error, nor in appellant's brief, and we therefore assume that they are not relied upon. The judgment and order appealed from should be affirmed.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

SAN BERNARDINO NAT. BANK v. ANDRESON et al.

No. 19,002; February 8, 1893.

32 Pac. 168.

Corporation—Note Signed as "President" and "Secretary."—Where defendants sign a note with their individual names, adding thereto "president" and "secretary," respectively, in which note they promise to pay plaintiff bank a certain amount, and there is nothing on the face of the note to indicate a principal back of them, they are personally bound, and cannot set up a defense that they executed

the note as officers of a corporation, that the loan which the note was given to secure was made to such corporation, and that the intention of both parties was that it should bind the corporation, and not defendants.[1]

Corporation—Note.—The Fact That a Resolution of the Corporation, with the corporate seal thereon, authorizing defendants to make the loan and execute the note in the name of, and as the note of, the corporation, was attached to the note, was without effect, as such attachment did not make the resolution a part of the note.

Promissory Note.—By Failing to Verify Their Answer, where a copy of the note was set out in the complaint, defendants admitted, not only the genuineness, but also the due execution, of the note.

Promissory Note—Reformation.—A Cross-complaint Setting Up the Facts in regard to the execution of the note, and praying that the corporation be made defendant, and that the note be reformed so as to make it the note of the corporation, could not be sustained; for, if a proceeding for reformation could be maintained by plaintiff, it could not by defendants, whose only interest in reforming the contract was to relieve themselves from liability thereon, and to show it was not their contract, but that of the corporation, which they cannot be allowed to do.

APPEAL from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by the San Bernardino National Bank against John Andreson and J. A. Crawford to recover on a promissory note. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Rowell and E. E. Rowell for appellants; Curtis, Oster & Curtis for respondent.

TEMPLE, C.—Defendants appeal from the judgment and from an order denying a new trial. The complaint is in the ordinary form, upon a promissory note, which is set out, and is as follows:

[1] **Cited** in the note in 117 Am. St. Rep. 240, on what written instruments may be canceled in equity.

Cited in note to Vliet v. Simonton, 43 Atl. 740, a case where the persons receiving the plaintiff's money had signed the note as "trustees" of a company having no valid existence. The jury were instructed to decide according to their opinion as to whether the intention of the parties at the time was to make the transaction a personal one, which instruction was approved on appeal.

"$2,000 San Bernardino, Cal., July 16, 1888.

"On August 16, 1888, at three o'clock P. M. of that day, (no grace), for value received, in gold coin of the government of the United States, we promise to pay to the order of San Bernardino National Bank, of San Bernardino, two thousand dollars, with interest from date at the rate of one per cent. per month until paid, payable monthly; both principal and interest payable in like gold coin.

"JOHN ANDRESON,
"President.
"J. A. CRAWFORD,
"Secretary."

The defendants answered, setting up two separate defenses. The first avers that the note was without consideration. The finding to the effect that there was sufficient consideration is fully sustained by the evidence.

The second defense was stricken out on motion of plaintiff, and this ruling is assigned as error. In this defense it is averred that the defendants, at the time of the execution of the note, were, and for a long time prior thereto had been, respectively, the president and secretary of the San Bernardino Fruit Company, a corporation, of which facts plaintiff had full knowledge; that, prior to the making of the note, plaintiff had agreed with the corporation to loan to it $2,000; that the money was so loaned and delivered to the corporation, and the note in suit was given to secure it, and for no other purpose; that plaintiff and its officers well knew the facts, and that the note was intended as and for the note of the corporation, and not as the individual note of the defendants, and that it was intended to bind the corporation and not the defendants, and was received by plaintiff as the note of the corporation; that the corporation had duly authorized, by resolution, the making of the loan, and these defendants to execute the note in the name of, and as the note of, the corporation, as plaintiff well knew, and that "there was attached to said note, as part thereof, a copy of said resolution, and that plaintiff received said note with such copy of said resolution attached thereto, which said resolution showed that defendants had been authorized by said company to make said note as the corporate note of said company, and not otherwise; and defend-

ants further allege that said note bore the impress of the corporate seal of said company, and was so received by plaintiff, which corporate seal disclosed the corporate name and capacity of said San Bernardino Fruit Company."

The case of Hobson v. Hassett, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320, would seem to be on all-fours with this. It was as manifest in that case as here that the loan was to the corporation; that the defendant did not intend to bind himself personally, but did intend to bind the corporation; and that all these facts were known to the payee. There, as here, the action was between the original parties to the note. In that case, also, as in this, there was nothing on the face of the note to indicate that there was a principal back of the defendant. The signature was the same as here, and it was held that the defendant was personally bound, and could not show a contract differing from that which he had executed. The fact that the resolution of the company, with the corporate seal, was attached to the note, did not make that document a part of the note. Besides, by failing to verify their answer, since a copy of the note was set out in the complaint, the defendants admitted not only the genuineness, but the due execution, of it: Code Civ. Proc., sec. 447; Burnett v. Stearns, 33 Cal. 473.

There was also a cross-complaint, to which plaintiff demurred. The demurrer was sustained, and defendants did not amend. It set up pretty much the same facts which were stated in the second defense, as above recited; prayed that the San Bernardino Fruit Company be brought in, and made a defendant, and that the note be reformed so as to make it the note of the San Bernardino Fruit Company. This is on the theory that the execution of the note by the defendants as their individual note was a mistake. Conceding that such a proceeding could be maintained by plaintiff, it is plain that it cannot be done by these defendants. This would not be a reformation of an instrument which had been executed by the corporation. It would be to compel the corporation to execute a contract to which it is now not a party, on the ground that the corporation intended to execute it, and plaintiff received the note believing that it had done so. The only interest defendants have in reforming the contract is to be relieved from it themselves; that

is, to have it show that it was not executed by them, was not their contract, but was the contract of the corporation. No authority for such a proceeding is cited, and I know of none. This would allow them to do indirectly that which it is held in Hobson v. Hassett they cannot do, to wit, to show by parol that they are not liable on the note as parties thereto.

The other alleged errors are disposed of by this conclusion. I advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

LOS ANGELES COUNTY v. REYES et al.

No. 19,106; February 8, 1893.

32 Pac. 233.

Eminent Domain—Opening Private Road—Damages.—Where defendant, through whose land a private road was surveyed, refused to accept the compensation awarded, and the case was tried by a jury, he cannot complain of the jury's action in assessing damages on the ground that the evidence is insufficient to justify the verdict, as the burden of proving damages rests on defendant.[1]

Eminent Domain—Private Road—Public Use.—Political Code, section 2692, provides that a private road may be opened for the convenience of one or more residents or freeholders in the same manner as public roads are opened, except that only one petitioner shall be necessary. Held, that while the principal use of such private road may be for the petitioner, as a means of egress from his farm, it is also for the use of the public, in deriving the benefit of his products, and in going to his place, and the legislature has the power to declare it a public use, for which the right of eminent domain may be exercised.[2]

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[1] **Cited** and followed in Tanner v. Provo Bench Canal & Irr. Co. (Utah), 121 Pac. 589, the court adding this to the cases on the same point given in 2 Lewis on Eminent Domain, third edition, section 645.

[2] **Cited** in the note in 102 Am. St. Rep. 828, on uses for which the power of eminent domain cannot be exercised.

Appeal—Oral Instructions.—The Appellate Court will not Consider an objection to oral instructions given by the trial court, where no exception was taken, nor the attention of the court called to anything objectionable therein.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by the county of Los Angeles against Pablo Reyes and others. From a judgment opening a road through defendants' property, and awarding damages therefor, defendant Reyes appeals. Affirmed.

Roberts & Robinson for appellant; James McLachlan, district attorney, Waldo M. York and B. M. Marble for respondent.

HAYNES, C.—This is an action to condemn certain lands for road purposes, by virtue of the provisions of article 6, title 6, part 3, of the Political Code, and of title 7, part 3, of the Code of Civil Procedure. The contemplated road is one designated in section 2692, Political Code, as a private road. Proceedings were duly taken by the board of supervisors, under the statute, upon the petition of Cheesebrough, to lay out and establish the road. Viewers were appointed, and reported. But defendants, through whose lands the road was surveyed, refused to accept the compensation awarded; and this proceeding was ordered by the board to be taken in accordance with the statute. The cause was tried by a jury, who found the special facts authorizing the condemnation of the land for the purposes of a private road, and assessed the damages and benefits accruing to the defendants, and the value of the land proposed to be taken: and the court, having made its findings to the effect that all the allegations of the complaint were true, and the allegations of the answer untrue, rendered the appropriate judgment. A motion for a new trial made by defendants was denied, and this appeal from the judgment and order denying a new trial is taken by the defendant Pablo Reyes alone.

The first point urged by appellant is that the evidence is insufficient to justify the verdict of the jury and the findings of the court, especially as to the damages awarded the

defendants, and the practicability of some other route than that selected by the viewers, and adopted by the court and jury. As to the first of these particulars the appellant cannot complain, if, as urged by counsel, there was no evidence, since the burden of proving the damages in condemnation cases rests upon the defendant. Counsel contend that the true rule is to determine the effect of the proposed change upon the market value of the property affected. Such evidence would, of course, cover the entire question of compensation, viz., the value of the land taken, and the damage to the land not taken, diminished by the benefits accruing to the defendant from the opening of the road; but it is not contended that defendant was prevented from giving evidence of such market value. The jury assessed the damages to the land not taken at $50, and the benefits at the same sum, and we think there was sufficient evidence to sustain each of those findings; and, as to the value of the land taken, there was evidence which, if uncontradicted, would have justified a less valuation than that found by the jury. All the facts necessary to enable the jury to make a proper estimate of the compensation to be awarded the defendant were as fully presented as could be reasonably required, and upon most points the evidence was sharply conflicting. As to whether it was practicable to locate the road upon section or quarter section lines, or by the route of Macala Canyon, the evidence was also conflicting, but, we think, largely preponderated against each of those routes, and that the selection made is fully justified by the evidence.

Counsel for appellant refer to the case of Sherman v. Buick, 32 Cal. 242, 91 Am. Dec. 577, and question its correctness. They admit that as a general rule a legislative declaration that a specified use is a public use, for which the right of eminent domain may be exercised, is not open to review by the courts, yet that when it appears plainly that property sought to be taken is for a purely private use, the courts are not bound by the declaration. But that is not this case. The use is not "a purely private use." The principal use will doubtless be by Mr. Cheesebrough, but every one of the public at large who may have occasion to visit his place has the right to use the road. Besides, the state and all its inhabitants have an interest in having the prod-

ucts of his land brought to market, thus adding to the wealth of the state, and the comfort of its inhabitants. Not that the state will do that for a man which he can do for himself; but where he is powerless to do that which is necessary to be done, and which is essential to the use and enjoyment of his property for purposes in which the public have an interest, it is clearly in the power of the legislature to declare the use a public one. This question must be regarded as settled by the case of Monterey Co. v. Cushing, 83 Cal. 511, 23 Pac. 700, where the case of Sherman v. Buick is approved. Nor is there any inconsistency between these cases and Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269, cited by counsel. For a more extended discussion of this subject, see the recent case In re Madera Irr. Dist., 92 Cal., especially pages 309 to 313, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 274, 275, 675.

It is further contended that the oral instructions given by the court were erroneous. This point cannot be considered, because no exception was taken to it, nor the attention of the court called to anything objectionable therein: Rider v. Edgar, 54 Cal. 130.

We see no objection to the instructions given to the jury at the request of the parties, nor do we think that the court erred in refusing to give the instructions requested by defendants which were not given. So far as they correctly stated the law, they were covered by instructions given; so that the court could properly decline to modify them, and none of them could properly be given without modification.

Several exceptions were taken to the rulings of the court upon the admission and exclusion of evidence; but, as the questions presented by these exceptions do not present any new or important principles of the law of evidence, it is sufficient to say that a careful consideration of them does not disclose any error which could prejudice appellant, or justify a reversal of the judgment. We therefore advise that the judgment and order appealed from be affirmed.

We concur: Vanclief, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

SCHALLERT-GANAHL LUMBER CO. v. SHELDON et al.

No. 19,044; February 9, 1893.

32 Pac. 235.

Mechanic's Lien—Filing—Completion of Work.—Under Code of Civil Procedure, section 1187, as amended by Stats. and Amend. 1887, page 154, providing that every person, save the original contractor, claiming a lien, must, within thirty days after the "completion" of the building, file his lien, but that any "trivial imperfection" in the construction shall not be deemed such a lack of completion as to prevent the filing of the lien, a lien filed before the doors of a house were hung, the plumbing finished, the closets and bathroom completed, ventilators placed, and moldings put in, is premature, and cannot be enforced, as such things are not "trivial imperfections," but are necessary to be done to effect a "completion" of the building.

APPEAL from Superior Court, Los Angeles County; William P. Wade, Judge.

Action by the Schallert-Ganahl Lumber Company against H. A. Sheldon and others to foreclose a materialman's lien. From a judgment for defendants, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

H. A. Barclay for appellant; W. P. Gardiner for respondents.

HAYNES, C.—Action to foreclose a materialman's lien. Appellant is a corporation engaged in the lumber business. Sheldon & Son are copartners, and contracted in writing with the defendant Annie C. Severance to furnish the material and erect upon her separate property a dwelling-house. Appellant furnished lumber to Sheldon & Son for the building, and a notice of lien therefor was filed. Both parties to this appeal concede that the contract was void. Sheldon & Son abandoned the work early in January, 1889, before completion, and Mrs. Severance employed mechanics, and proceeded with the work. In May, 1889, she, with husband and servants, moved into and occupied the rear

portion of the house, and continued such occupation while work proceeded upon the remainder of the building; and upon August 22, 1889, appellant filed its notice of lien. Sheldon & Son made no defense, and judgment passed against them. Mr. and Mrs. Severance answered, and upon the trial rested upon plaintiff's evidence, and had judgment. This appeal is from the judgment and order denying plaintiff's motion for a new trial.

The court found that the building was not completed at the time the notice of lien was filed; and, if that finding is justified by the evidence, it will not be necessary to consider any other specification of error. The occupancy of the rear portion of the house was known to appellant on June 25th, but appellant makes no point upon such occupancy. The complaint alleges completion "on or about August 22d," and whether the building was then completed was a question of fact to be determined by the court: Willamette Steam Mills Lumbering etc. Co. v. Los Angeles College Co., 94 Cal. 237, 238, 29 Pac. 629. The only witness who testified upon the subject of the completion of the building was Mr. Driscoll, the secretary of the plaintiff corporation. He testified in substance that he visited the building on August 21st; that workmen were there on that day, doing some little things; that there might be one or two men there for several months doing little things, waiting the arrival of material from the east; that Mr. Cranton was working in the house; that Cranton said there were twenty-four doors to hang, ventilators to make, water-closet traps, bathroom not completed, wardrobe not completed, a painter working on the house; that the doors were made, and only had to be hung; that the oxidized hardware, door knobs and locks were not on; that it was stated the locks cost $35 each—a couple of thousand dollars on the whole house, he heard; that he did not know whether the tiling was in the bathroom, nor whether the picture moldings were up in the second story, nor whether the front chamber was completed, nor whether the closets were finished, or the plumbing finished, but thought the house was substantially completed; and, further, that the oxidized hardware and the tiling he thought were not in the contract. Such was the condition of the building on August 21st, the day before the lien was filed,

and that was the last time the witness visited the house. Upon this evidence we think the court correctly found that the notice of lien was prematurely filed; that the building was not substantially completed, and that what remained to be done constituted something more than "trivial imperfections." The burden of proof was on the plaintiff to show completion of the building within thirty days prior to the filing of the lien. Mr. Driscoll testified that he "thought the house was substantially completed," but admitted that certain things, which it is apparent are necessary to completion, had not been done, while his testimony that he did not know whether certain other things had been completed, and which he could have ascertained by inspection, destroys any weight which his statement that he "thought the house was substantially completed" might otherwise have had. It is immaterial whether the oxidized hardware and tiling were in the written contract attempted to be made with Sheldon & Son, or whether they were to be furnished by the owner or the contractor. If the use of these materials was necessary to the completion of the building, the purchase of them by the one party or the other could not affect the question whether the building was completed. As was said in a recent case: "In the absence of any statutory qualification or definition of the term 'completion,' there would be no room for its construction by the court, but it would be construed to mean 'completion,' and would be a question of fact in each case": Willamette Steam Mills Lumbering etc. Co. v. Los Angeles College Co., 94 Cal. 237, 29 Pac. 629. For a statement of these qualifications and definitions, and their application, see Id. It may be quite true that it would not take long to do what remained to be done, and that what remained to be done was trifling, compared with the whole work of building an elegant residence; but it must be obvious that if the erection and completion of the house had been provided for in a valid contract, the contractor could not have successfully insisted on the day the lien was filed that he had complied with his contract within the meaning of any of the qualifications or exceptions contained in the statute. That the filing of a lien before the completion of the building is premature and confers no right, see Roylance v. San Luis Hotel Co., 74 Cal. 273, 20 Pac. 573, and Willamette Steam Mills Lumbering etc. Co. v. Los An-

geles College Co., supra. The judgment and order appealed from should be affirmed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

MAXWELL v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY.

No. 19,109; February 11, 1893.

32 Pac. 443.

Mandamus to County Board—Advertising Contract.—Under Statutes of 1891, chapter 216, section 25, subdivision 23, providing that the board of supervisors shall fix the price of all county advertising, mandamus will not lie to compel such board to contract for such advertising by giving public notice calling for proposals. Such statute repeals Political Code, section 3766, providing that county advertising must be contracted for with the lowest bidder.[1]

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Mandamus at the relation of H. M. Maxwell to compel the board of supervisors of Los Angeles county to give public notice calling for proposals for county advertising. From a judgment dismissing the petition, entered upon an order sustaining a demurrer to it, relator appeals. Affirmed.

E. A. Meserve for appellant; James McLachlan, district attorney, and B. M. Marble and Waldo M. York for respondents.

PER CURIAM.—This appeal is taken from a judgment of dismissal of a petition for a writ of mandate, after de-

[1] Cited in Frandzen v. County of San Diego, 101 Cal. 321, 35 Pac. 898, as a case involving the law regulating the advertising for bids for county advertising, as distinguished from the law, under discussion there, regarding the printing of the "great register" of voters.

murrer sustained to such petition on the ground that it did not contain facts showing a cause of action. It depends for its determination upon the construction to be given to subdivision 23 of section 25 of the county government act of 1891, as affecting the provisions of section 3766 of the Political Code as it stood before the passage of the act. It has been held in the case of Journal Publishing Co. v. Whitney, 97 Cal. 283, 32 Pac. 237 (this day decided), that the county government act repeals so much of section 3766, Political Code, as requires the board of supervisors to contract for the publication of the delinquent tax list by advertising for sealed proposals to do the same, and awarding the advertising of the list to the lowest bidder. It is plain that the legislature intended to make it the duty of the board of supervisors themselves, in the exercise of a proper discretion, to fix the price of such advertising, without any necessity for giving public notice calling for proposals from those wishing to do such work; but the contract for advertising is to be made by the proper officer, and for a price not exceeding that fixed by the board of supervisors.

Judgment affirmed.

LOS ANGELES CEMETERY ASSOCIATION v. CITY OF LOS ANGELES.

No. 19,028; February 11, 1893.

32 Pac. 240.

Dedication of Street—What Constitutes.—In an action to quiet title to a strip of land, it appeared that plaintiff company filed for record a map of its land, platted as a cemetery, on which map the strip in question, forty feet wide along the west side of the tract, was left blank, with an entrance indicated therefrom into the cemetery. Subsequently, in cutting the land up into cemetery lots, the company left another strip, twenty feet wide, adjoining the former strip, and the whole was known as "E. Avenue," which was used by the public for three years without objection. Held, that the facts showed an intention to dedicate the strip to the public for street purposes.

Dedication of Street—Acceptance.—User by the Public of a Strip of land as a street for four years is sufficient to show acceptance of a previous offer to dedicate the land for street purposes.[1]

APPEAL from Superior Court, Los Angeles County; Walter Van Dyke, Judge.

Action by the Los Angeles Cemetery Association against the city of Los Angeles to quiet title. Judgment for defendant. Plaintiff appeals. Affirmed.

A. H. Judson and M. C. Hester for appellant; C. McFarland for respondent.

BELCHER, C.—This is an action to quiet the plaintiff's title to a strip of land, forty feet wide and twelve hundred and thirty-six feet long, in the city of Los Angeles. The court below gave judgment for the defendant, from which, and from an order refusing a new trial, the plaintiff appeals. The facts found by the court are in substance as follows: On October 26, 1887, the plaintiff, a corporation, was the owner of a tract of land in the city of Los Angeles, which included the land in controversy, and on that day it filed for record a map of the tract, on which were delineated the usual plats and avenues of cemetery grounds, and along the southerly and westerly sides of which were left blank colored strips, forty feet in width, the one on the southerly side being now a portion of First street, and the one on the westerly side being the land in controversy. The map also showed that the only entrance to the cemetery was from the strip in controversy, and that the strip opened out at one end into First street, and at the other end into Broderick avenue, public streets of the city. About the time of the filing of this map, plaintiff planted along the easterly and inner line of the street in controversy a hedge fence, leaving an opening therein where the entrance to the cemetery was located, and also planted pepper trees for a short distance on each side of such entrance, which hedge fence is still intact, and is now, and

[1] **Cited** in Riley v. Buchanan, 116 Ky. 633, 63 L. R. A. 42, 76 S. W. 529, as supporting the general doctrine of the acceptance by the public being presumed from the long-continued use of the highway.

Cited in the note in 129 Am. St. Rep. 609, on what constitutes dedication to and acceptance of a public street.

has been since the year 1885, a good and substantial fence. In 1885 plaintiff moved a fence which had been erected upon the outer or westerly line of the strip into the inner line thereof, and adjoining the hedge fence on the easterly side thereof. Sometime about the year 1885, the lands adjoining the strip in controversy on the west side were laid out in lots, and spaces between them for streets, and among other spaces was one twenty feet in width, the full length of and adjoining the said strip, and making therewith a sixty-foot strip, known as "Evergreen Avenue." Previous to and since 1885, plaintiff has sold to divers persons a great number of lots in its cemetery, and the only carriage entrance thereto fronts on the strip of land in dispute, about midway between the north and south ends thereof. Since the year 1885, the said strip of land has been continuously used and traveled by the public as a public street, which use has been with the knowledge and consent of plaintiffs. On December 15, 1890, the city council of the city of Los Angeles duly passed an ordinance accepting all streets theretofore dedicated, or offered to be dedicated, by property owners for public use. And, as conclusions of law, the court found that the said strip of land was a part and portion of a public street in the city of Los Angeles, known as "Evergreen Avenue"; that the plaintiff had no right to its possession; and that the defendant was entitled to its possession as a public street. Judgment was entered in accordance with these conclusions.

In support of the appeal it is claimed that the findings that the plaintiff moved the fence which had been erected along the westerly line of the disputed strip in the year 1885; that the lands adjoining the strip on the west were laid out in lots, etc., about the same year; and that since that year the said strip had been continuously used and traveled by the public as a public street—were not justified by the evidence, in so far as the year named is concerned; and it is said that the evidence clearly shows that none of the acts referred to were done or commenced before the year 1887. It is admitted that the fence on the south side of the tract was removed in 1885, and there was some evidence that the fence on the west side was removed about the same time, and that the use of the strip for public travel commenced shortly after the fence was taken away. But whether the findings were right as to the

year named or not is, in our opinion, not material. The only real question is, Do the findings show a dedication of the strip, or offer to dedicate, for the purposes of a street, and an acceptance by the public? And if they do, it can make no difference whether the dedication or offer to dedicate was in 1885, or not till 1887.

It is further claimed that the first conclusion of law was erroneous and not justified, for the reason that the plaintiff, having been organized as a corporation for cemetery purposes, "had no power, directly or indirectly, to dedicate its land to the public for street purposes." This claim is sufficiently met and answered by the decision of this court, reported in 95 Cal. 420, 30 Pac. 523. That case was between the same parties as this, and the question involved related to the dedication of the forty-foot strip along the south side of the plaintiff's track. It was held that the dedication was made and accepted, and that the strip formed a part of First street.

It is also claimed that, admitting an offer to dedicate was made by the plaintiff, still there was no direct finding, and no sufficient evidence to show, that the offer was ever accepted by the public. The court found, as we have seen, that after the fence was removed, the strip was continuously used by the public as a public street, and with the knowledge and consent of the plaintiff. The correctness of the finding in this respect is not questioned, nor could it be here, there being ample evidence to support it. The user then commenced as early at least as 1887, and was continued up to the time of the trial in 1891. This was sufficient to show an acceptance without the formal ordinance passed by the city council in 1890. The question of the admissibility of that ordinance in evidence need not, therefore, be specially considered.

Did, then, the plaintiff intend to dedicate the strip to the public for street purposes? It is true that the law is well settled in this state and elsewhere that, where there is no grant in writing, a dedication of land can only be established by proof of acts on the part of the owner which manifest clearly and unequivocally the intention of the owner to make such dedication; but, in our opinion, the probative facts found do show acts and conduct on the part of the plaintiff from which the ultimate fact that there was an intention to dedicate the strip must necessarily result. If not, why was the strip

marked out on the map, extending the whole length of the tract, with an entrance therefrom into the part laid out for cemetery purposes? The surveyor who laid out the grounds and made the map says he was simply told to leave a forty-foot strip on the south and west sides, and "I supposed they were left for streets." And why did the owners of the adjacent land on the west leave an additional twenty-foot strip? Judson, who had been president of the corporation, testified that he was one of such owners, and that they "left twenty feet along there for street purposes. There is a twenty-foot strip left there." So, after the hedge had been growing for eight or ten years, why was the fence removed, and the strip, in connection with the additional twenty-foot strip, left open so that it could be used and traveled over by the public? And why was the public permitted to use the strips which had become known as "Evergreen Avenue" for more than three years at least without objection on the part of the plaintiff? It seems to us that these undisputed facts can be rationally accounted for only upon the theory that there was a clear intention to dedicate the strip for the purposes of a street.

The offer on the part of the plaintiff to prove that the fence was removed "because it had become out of repair, and for the purpose of using it in repairing the breaks in the hedge," does not require serious consideration. Surely, if the fence needed repairs, the repairs could have been made more cheaply and better where it had stood for eight or ten years than by moving the whole line of it a distance of about forty feet; and if there were breaks in the hedge, which does not appear, they could have been protected by the fence in its original location, as they had been ever since the hedge was planted in 1878. We see no error in the ruling of the court upon this offer. It follows, in our opinion, that the conclusions of the court below were warranted, and were correct, and that the judgment and order appealed from should be affirmed.

We concur: Haynes, C.; Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

In re WILLIAMS' ESTATE.

(Appeal of MAGEE.)

No. 15,012; February 14, 1893.

32 Pac. 241.

Executor's Sale—Advanced Bid.—An Executor, as Devisee in Trust, acting under the provisions of the will, sold property of the estate, and applied to the probate court for a confirmation. Plaintiff filed an advanced bid with the court, whereupon the executor conveyed the property to the first bidder. The court denied confirmation, and ordered and confirmed a sale to plaintiff, he paying the amount of his bid to the executor. The first bidder appealed from the order of confirmation, which was reversed. Plaintiff then filed a petition to compel the return from the estate to him of the money paid to the executor. Held, that plaintiff held no debt or claim against the estate.

Executors—Allowance of Claim.—An Appeal cannot be Taken to the supreme court from an order dismissing the petition, under Code of Civil Procedure, section 963, subdivision 3, which provides for an appeal from a judgment or order refusing, allowing, or directing the payment of a debt or claim against an estate. In such case plaintiff's remedy is in an action against the executor individually.

APPEAL from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by Thomas Magee against the executor of the estate of Thomas H. Williams to recover money paid. From an order dismissing the petition, plaintiff appeals. Affirmed.

W. S. Goodfellow, John A. Stanley and George R. B. Hayes for appellant; Adams & Adams for respondent.

TEMPLE, C.—This appeal is from an order denying and dismissing the petition of appellant for an order that the executor of the estate of Thomas H. Williams restore to him $11,000 purchase money paid for the interest of the testator in certain real estate in pursuance of an order of the court confirming the sale. The executor filed a report of a sale made by him under a power of sale contained in the will. Appellant's agent and assignor thereupon filed in the probate court

an advanced bid. The matter was postponed for some time, but the sale was finally confirmed to appellant's assignor, who thereupon paid $11,000—the amount of his bid—to the executor, who executed and delivered to him a deed in due form. By the will, the real estate had all been devised to the executor, in trust. After the advanced bid was filed, but before the confirmation of the sale to appellant's assignor, the executor, in his capacity of trustee, conveyed the property to the first bidder, who, after appellant had paid his money and had received his deed from the executor, appealed from the order of confirmation to this court. This court held (92 Cal. 183, 28 Pac. 227, 679) that under the circumstances the sale was properly made by the devisee in trust, and therefore reversed the order of confirmation. The remittitur having been filed in the court below, this petition was presented.

The respondent now makes the point that the order dismissing the petition is not appealable. I think the point well taken. If an appeal is allowed in such case, it must be on the ground that appellant has a claim or debt against the estate for the amount so paid to the executor, and that the order dismissing his petition is an order refusing to allow, or refusing to direct the payment of, a debt or claim, within the meaning of the third subdivision of section 963 of the Code of Civil Procedure. It may well be doubted whether appellant's demand is a claim or debt against the estate in any sense. After the order of confirmation was reversed, and the property had been legally sold, and the proceeds accounted for to the estate, it is difficult to see how the executor can be made to account for this amount. But if we examine the section of the code alluded to we shall find that it contains no general language giving this court jurisdiction of appeals from probate rulings, but the appellate jurisdiction is conferred by specially enumerating certain orders and judgments from which appeals may be taken. All refer to acts which the code expressly authorizes, and very nearly in the order in which such action is likely to be taken in the course of administration. Such an enumeration is necessarily a limitation. The words "claim" and "debt" are used interchangeably in the code, as in section 1497, Code of Civil Procedure, and elaborate provision is made, running through many sections, for their presentation, allowance, rejection, and finally for an

order directing their payment: Code Civ. Proc., sec. 1647 et seq. Manifestly, in the subdivision of section 963 reference is made to debts and claims which can be so allowed, rejected, or ordered paid. It will not be contended that the demand of petitioner is of that character, even if it be conceded that it is a demand against the estate. In the case of Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35, it was held that a demand for an attorney's fee for services rendered the administrator was not a claim within the meaning of section 963, Code of Civil Procedure. In that case the appellate jurisdiction was sustained on the ground that the demand had in fact been presented and allowed, and therefore ranked among the acknowledged debts of the estate. The court said: "In this instance it is apparent the demand was presented, allowed, and ordered paid as a claim against the estate, to be paid, not as costs, but in the due course of administration. When so allowed, it became one of the 'acknowledged debts of the estate, to be paid in due course of administration': Code Civ. Proc., sec. 1497. When thus treated, an order for its payment was appealable, under section 963, supra." The order was held appealable as an order directing the payment of a debt. Whether it was thus rightly held to be a debt or not, in view of section 1643, Code of Civil Procedure, and other sections, may be doubted, but the case is express authority for the proposition that to authorize an appeal under section 963 the order allowing, refusing to allow, or directing the payment of a debt refers to debts and claims, which by the code are expressly mentioned as debts to be allowed, rejected, or ordered paid. Courts may always order the expense of managing trust funds paid from the estate held by the trustee. The debts of an estate, which include all other payments authorized, are classified in section 1643, Code of Civil Procedure. The debt of appellant—if it be one—is not included in that section, unless in the fifth class, which supposition would be absurd. The word "claim" is applied to a demand against an estate, in the code, after it has been allowed as well as before: Code Civ. Proc., secs. 1636, 1645, 1649. In section 1636 it is provided that an heir may contest a claim against an estate upon final settlement of the account of the administrator or executor. If this be a claim against the estate, it should not be ordered paid until the final settlement,

after the heirs or devisees have had an opportunity to contest the appellant's right to it. Whether the payment was voluntary or not raises a question not passed upon by this court on the former appeal.

Whether the probate court had jurisdiction to confirm the sale or not, the money is not now held by the executor for the estate. To recover it from him by suit it would not be necessary to make the estate a party. Any property in the hands of the executor, which is not a legal asset, may be recovered by the rightful owner, without presenting a claim against the estate. So held in People v. Houghtaling, 7 Cal. 348; Gunter v. Janes, 9 Cal. 643; Myers v. Reinstein, 67 Cal. 89, 7 Pac. 192; In re Allgier, 65 Cal. 228, 3 Pac. 849; Stanwood v. Sage, 22 Cal. 517. The decisions seem to be uniform upon this point. Property, though lawfully possessed by the administrator as assets, may be recovered in an action against him individually by one who asserts title adverse to the estate: Merick's Estate, 8 Watts & S. (Pa.) 402; Beach v. Forsyth, 14 Barb. (N. Y.) 499. At first impression, De Valengin v. Duffy, 14 Pet. 282, 10 L. Ed. 457, may seem to be an authority to the effect that a claimant may elect to sue the administrator individually or in his representative capacity. Decedent had been vested by the claimant with the legal title to personal property, which was afterward taken from him wrongfully. After his death his administrator recovered the value of it. The claimant sued to recover the money. Pending the suit the administrator died. The question was whether the suit could be continued against the administrator de bonis non. It was held that it could be, on the ground that the money constituted assets of the estate, and that the administrator de bonis non could recover it as such from the estate of the administrator. It was said the defendant would not be held liable unless he so recovered it, or failed through his neglect. After all, then, it was against the administrator, individually, and the decision is in accord with those quoted from this state. A trustee cannot make the estate liable for his own wrongful act. Suppose the executor had absconded with the money, could it then have been recovered from the estate? Are the beneficiaries of a trust sureties for their trustee? They did not procure the erroneous order. Evidently the mere custody of the funds would not make the beneficiaries of the trust re-

sponsible. To hold them it must not only appear that it came to the hands of their trustee, but that it has been actually paid to them, or used for the benefit of their estate. There is no mode in which an action could be brought against the estate upon this demand: Code Civ. Proc., sec. 1500. No mode is provided in which it could be paid in course of administration. Unless, therefore, it be a claim which could be enforced against the executor individually, the claimant has no remedy. The only ground upon which it could be plausibly argued that the court had the power to grant the relief prayed for is that the executor is an officer of the court. This is suggested in the briefs, but, if that be the basis of the power to grant the petition, this order is not appealable. I think the appeal should be dismissed.

McFARLAND and FITZGERALD, JJ.—For the reasons given in the foregoing opinion the appeal is dismissed.

DE HAVEN, J.—I concur in the judgment. The order from which this appeal is taken is not appealable.

SAN DIEGO FLUME CO. v. CHASE.*

No. 19,083; February 14, 1893.

32 Pac. 245.

Contracts—Parol Evidence to Explain.—Where a contract has been interpreted on an appeal to this court, such contract is not ambiguous or uncertain, and on a new trial parol evidence cannot be introduced to show the intention of the parties, under Civil Code, section 1649, and Code of Civil Procedure, section 1864, authorizing parol evidence in cases of doubtful and ambiguous contracts, for these sections do not apply when the courts are able to declare the true intent of the parties.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by the San Diego Flume Company against Levi Chase for the reformation of a contract. From the judgment, defendant appeals. Affirmed.

*For former opinion, see 87 Cal. 561, 25 Pac. 756, 26 Pac. 825.

Levi Chase and Hunsaker, Britt & Goodrich for appellant; Shaw & Holland for respondent.

TEMPLE, C.—This is an appeal from the judgment, with a bill of exceptions, and is the second appeal in the case: See 87 Cal. 561, 25 Pac. 756, and 26 Pac. 825. The nature of the case, and most of the facts necessary for understanding it, are there stated. As stated, the action was brought to have a contract reformed to accord with the alleged intention of the parties, which, it was averred, was to sell two and one-quarter inches of water, miners' measure, under a four-inch pressure, whereas, by the fraud of defendant, the contract was so drawn as to entitle defendant to all the water which would run through two connections of a two-inch iron pipe, entering the side of plaintiff's flume near the bottom, to be carried through one and one-half inch standard pipes. The defendant answered, and filed a cross-complaint asking for a specific performance of the agreement, and a restoration of the pipes which had been removed by plaintiff, etc. Upon the first trial he had judgment, and the plaintiff appealed to this court, when it was held that the contract meant, and could only mean, without rendering some part of it inoperative, that "two and one-quarter inches of water, miner's measure, under a four-inch pressure, it is the privilege of the defendant to take and distribute daily, as he pleases, over his land, through his pipe system attached to plaintiff's flume." It was also said of the two provisions, one in regard to the pipes, and the other in regard to the quantity of water: "The one clause refers to the amount of water to be taken; the other, to the manner of taking." After the remittitur was filed in the lower court, the defendant, on due notice, asked leave of the court to amend his cross-complaint by adding thereto an allegation to the effect that at the time the contract was executed both parties understood, and plaintiff knew that defendant understood, that the true interpretation of the contract was that defendant was entitled to have all the water he might need for uses specified, and might draw from the pipes, regardless of the amount that might be required, and was not limited to two and one-quarter inches mentioned as a water right. Leave to so amend was refused, and defendant excepted. Evidence was offered at the trial to prove the

facts stated in the proposed amendment. The evidence was rejected, and defendant again excepted. Whether these rulings were correct is the question on this appeal.

These rulings are attacked as a violation of section 1649 of the Civil Code, and section 1864 of the Code of Civil Procedure. These two sections seem intended to accomplish the same purpose, although expressed in different words; and if they authorize the introduction of parol evidence to ascertain the intention of the parties, where the contract is ambiguous or uncertain, this does not mean whenever the proper interpretation of a contract is a difficult matter, or one about which men may differ. They are qualified by section 1639 of the Civil Code and section 1859 of the Code of Civil Procedure. If, after a full consideration, with a full knowledge of the surrounding circumstances, the court is able to declare with certainty what the intention of the parties was, from the writing itself, no matter how difficult the task may be, it is not ambiguous or uncertain, within the meaning of the rule, and the court cannot, as it is said, travel outside the four corners of the instrument. That the instrument in question here can be so interpreted is manifest from the fact that its meaning was clearly ascertained and determined by this court. That counsel have held different views, or courts have otherwise decided, or have held divers views upon the subject, does not tend even to establish such ambiguity or uncertainty. No matter how much this court may have doubted what the true construction ought to be, if finally satisfied that the intent can be certainly ascertained from the writing, parol evidence cannot be introduced, as to the intention of the parties, on the ground that its terms are ambiguous or uncertain.

I concur: Vanclief, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

KLAUBER et al. v. VIGNERON et al.

No. 14,869; February 14, 1893.

32 Pac. 248.

Marriage—Transfer of Mortgaged Premises in Consideration of.—A conveyance by the owner of mortgaged premises, in consideration of marriage and money received, of his interest in the premises, to his intended wife, is valid.

Marriage—Transfer of Mortgaged Premises in Consideration of.—Where such mortgagor, after marriage, substitutes for the previous mortgage, which is canceled, one of larger amount, the last-named mortgage is void.

Marriage—Transfer of Mortgaged Premises in Consideration of.—If the mortgagee is entitled to any relief, he should declare on the previous mortgage, and ask to have the satisfaction set aside on the ground that it was made through mistake, accident, or fraud.

APPEAL from Superior Court, San Diego County; George Puterbaugh, Judge.

Action by A. Klauber and another, partners as Klauber & Levi, against George Vigneron and another, and Joanna Vigneron, to foreclose a mortgage. Judgment for plaintiffs. Joanna Vigneron appeals. Reversed.

Hunsaker, Britt & Goodrich for appellant; A. E. Cochran for respondents.

BELCHER, C.—The material facts of this case are as follows: On December 16, 1887, the defendant George Vigneron executed to John A. Watson his promissory note for $300, and a mortgage to secure its payment on certain real property which he then owned. This note and mortgage were subsequently assigned to the plaintiffs. On January 26, 1888, Vigneron executed to the plaintiffs his promissory note for $700, due one year after date, and a mortgage to secure its payment on the same real property. On July 16, 1888, Vigneron, for the expressed consideration of one dollar executed, acknowledged, and delivered to Joanna Ford a deed conveying to her the mortgaged property, which deed was duly filed

for record on October 1, 1888, and was thereafter duly recorded. On July 17, 1888, Vigneron and Joanna Ford were married, and have ever since been husband and wife. On May 7, 1889, Vigneron executed to the plaintiffs his promissory note for $1,200, due six months after date, and a mortgage to secure its payment on the same real property mortgaged and conveyed as before stated; and on the same day the plaintiffs marked "paid" their $700 note, and delivered it to the maker, and also satisfied of record the mortgage given to secure its payment. On January 1, 1890, Vigneron and his wife Joanna, executed to C. H. Hill their promissory note for $3,500, due one year after date, and a mortgage to secure its payment on the same real property. Each of the before-mentioned mortgages was duly recorded on the day or the day after its date. On June 27, 1890, the plaintiffs commenced this action to foreclose their $300 and $1,200 mortgages; and Vigneron, Mrs. Vigneron and Hill were made parties defendant. The complaint, among other things, alleged that the $1,200 mortgage "was given in lieu of, and substitution of, and in renewal of" the $700 mortgage which had been satisfied, and that neither of said mortgages had been paid; and that Mrs. Vigneron claimed an interest in the mortgaged property by virtue of the conveyance to her of July 16, 1888, but that the said deed was accepted by the grantee "with full knowledge of the existence of said debt, and of its nonpayment," and her interest or claim was subsequent to the lien of the plaintiffs' mortgage. And the prayer was that plaintiffs have judgment for the amounts due for principal and interest on the $300 and $1,200 notes, together with attorneys' fees and costs; that the deed from George Vigneron to Joanna Ford be ordered delivered up, and canceled, and that plaintiffs be subrogated to the rights of the payees of the $700 note; that the mortgaged land be decreed to be subject to and sold under the $1,200 mortgage, and that the proceeds of the sale be applied in payment of the amount due the plaintiffs; that the defendants, and all persons claiming under them, be barred and foreclosed of all rights and claims in and to the said premises, and every part thereof; and that the plaintiffs have judgment and execution against George Vigneron for any deficiency, etc. George Vigneron failed to answer, and judgment was rendered against

him by default. Mrs. Vigneron answered, and admitted that she claimed an interest in the mortgaged premises under and by virtue of the conveyance made to her on July 16, 1888; denied that her interest in the premises was subject to the lien of plaintiffs' $1,200 mortgage, but, on the contrary, averred that it was prior and paramount to said mortgage; denied that said deed was made or accepted by her with any knowledge of the existence of the said debt, or its nonpayment; and, upon information and belief, denied that the $1,200 mortgage was given in lieu of, substitution of, or renewal of the $700 mortgage; and also, in like manner, denied that the last-named mortgage had not been paid. Hill answered, making substantially the same denials and averments as are made by Mrs. Vigneron in her answer, and then, by way of cross-complaint, set up his note and mortgage, and asked for a foreclosure. The case was tried, and the court found the facts as to the notes and mortgages, the conveyance, and the marriage of defendants, to be as before stated. It also found that the $1,200 mortgage was given in lieu of, substitution of, and as renewal of the $700 mortgage, and that all the allegations and averments of the plaintiffs' complaint were true, and all the denials and allegations of the defendants' answer were untrue. It further found the amount due Hill upon his note and mortgage. And as conclusions of law it found, among other things, that the plaintiffs were entitled to the relief sought under the note and mortgage for $1,200, to the extent of the amount due upon the note and mortgage for $700, with interest thereon to the date of the decree, making in all $965.08, for which amount plaintiffs had a priority of lien over the claims of defendants Hill and Joanna Vigneron. A decree was accordingly entered in favor of the plaintiffs, and from that decree, and an order denying her motion for a new trial, Mrs. Vigneron appeals.

When the deed of July 16, 1888, was executed, the parties to it intended to be, and were in fact, married on the next day. The consideration for the deed, as stated therein, was one dollar, but the real consideration, as shown by the uncontradicted testimony, was the proposed marriage, and about $1,000 in money advanced and paid by the grantee to the grantor. Marriage alone is a good and sufficient consideration for an antenuptial settlement, and such a settlement

will not be set aside, in the absence of the clearest proof of fraud, participated in by both parties: Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360. The deed was therefore not a fraudulent transfer, and the contention of respondents on this point cannot be sustained.

When the deed was delivered and accepted, it operated to vest the title to the premises conveyed in the grantee, subject, of course, to any valid subsisting liens thereon; and the grantor had thereafter no power to convey, mortgage, or encumber the same. As said in Barber v. Babel, 36 Cal. 20, after citing numerous authorities, the cases "establish the principle that after a conveyance of the mortgaged premises, or the transfer of an interest therein, the mortgagor has no power to create, revive, renew, or prolong a charge upon the premises, or interest therein, so conveyed or transferred, while such interest remains in another party." The mortgage to secure the $1,200 note was therefore void; and whether or not it was given in lieu of, substitution of, and in renewal of the $700 note and mortgage, is a matter entirely immaterial for the purposes of this case. If the plaintiffs were entitled to any relief by reason of the last-named mortgage, they should have declared upon it, and asked to have the satisfaction set aside upon the ground that it was made by or through mistake, accident, or fraud. The judgment rendered upon the $1,200 mortgage cannot be sustained; and we advise, therefore, that the judgment and order appealed from be reversed and the cause remanded for a new trial, with leave to the plaintiffs to amend their complaint, if so advised.

We concur: Vanclief, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded for a new trial, with leave to the plaintiffs to amend their complaint, if so advised.

FLETCHER v. NORTHCROSS.

No. 19,007; February 17, 1893.

32 Pac. 328.

Mortgage or Conditional Sale.—Foreclosure Proceedings were Dismissed, and the mortgagor executed a deed to the mortgagee, pursuant to an agreement whereby the mortgagee was to satisfy the mortgage of record, and the mortgagor was to have the privilege of selling the land within six months thereafter, and retain all moneys which he might receive therefor over and above a specified sum, which he was to pay to the mortgagee. Held, that, in view of the facts that the mortgagor made no promise to pay any sum to the mortgagee, that the sum to be paid the mortgagee in case of a resale was several thousand dollars less than the mortgage debt, that no interest was to be paid by the mortgagor, and that the mortgagee at once took possession of the premises, the transaction must be construed, not as a mortgage, but as a conditional sale, to become absolute on the mortgagor's failure to sell the land within the time specified.

APPEAL from Superior Court, Orange County; J. W. Towner, Judge.

Action by John R. Fletcher against James W. Northcross to recover the possession of real estate. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Anderson & Anderson, F. W. Sanborn and Julian P. Jones for appellant; Victor Montgomery and C. C. Hamilton for respondent.

TEMPLE, C.—This action was brought to recover the possession of real estate under section 380 of the Code of Civil Procedure. Two defenses are pleaded. The first simply denies plaintiff's title and right of possession. In the second, it is shown that plaintiff claims title under and from defendant, and it is averred that the deed from defendant, under which plaintiff claims, was intended and received as security for a loan, and is therefore a mortgage. Defendant alleges that on the first day of August, 1890, he was indebted to plaintiff in divers sums upon certain notes, secured by mort-

gage upon the premises described in the complaint. That the amount of the indebtedness was $21,000. The mortgaged premises were then worth $35,000. That defendant desired to sell, and from the proceeds to pay plaintiff's demand. That he might be able to give a clear title, it was agreed between himself and plaintiff that the mortgages should be nominally satisfied of record, and, in lieu of them, defendant should execute to plaintiff an absolute deed, and plaintiff would then reconvey to defendant by a deed, which should be placed in escrow, to be delivered to defendant upon payment of $21,000 to Balcom, who was to hold the deed. That this agreement was carried out, and a deed conveying the premises to defendant was executed, and placed in the hands of Balcom, with written directions to deliver the same to defendant on receipt of $21,000, on or before February 1, 1891. That it was agreed that, upon sale of said premises, plaintiff should have $21,000 of the proceeds, and no more, and that the residue, if any, realized from the sale, should belong to defendant. That defendant diligently endeavored to procure a purchaser for said land, but was unable to consummate a sale. That the plaintiff, in violation of his obligation, has at all times since the execution of the deeds endeavored to discourage, and did discourage, many intending purchasers from purchasing said land, and, in consequence of such acts of plaintiff, defendant has been unable to procure a purchaser. In reference to this defense the court finds that on the first day of August, 1890, defendant was indebted to plaintiff in divers sums, evidenced by certain promissory notes, and secured by mortgages upon the land in controversy; that there was due upon the mortgages between $26,000 and $27,000, that an action brought by plaintiff was then pending to foreclose the mortgages; that defendant, in consideration of having the indebtedness satisfied and the mortgages discharged, conveyed the land to plaintiff, who thereupon canceled, satisfied, and discharged the indebtedness and the mortgages, and dismissed the suit pending for foreclosure, and at the same time agreed that the defendant should have, for the period of six months thereafter, the right and authority to sell said land, and to retain all moneys he might receive therefor, over and above $21,000, and might, during that period, retain possession of the house and barn on the premises, and, in pursuance of this agree-

ment, executed a deed conveying the land to defendant, and placed the same in escrow in the hands of Balcom, to be delivered to defendant upon receipt of $21,000, if paid prior to February 1, 1891, and, in case said sum was not paid by that time, the deed to be surrendered to plaintiff; that no sale was made by defendant, and shortly after the first day of February, 1891, the deed was surrendered to plaintiff in pursuance of the understanding; that all the other allegations in the answer were untrue. Judgment was thereupon entered for plaintiff. The defendant appeals from the judgment, and from an order refusing a new trial.

The question presented is whether the transaction must be considered a mortgage, or an actual sale to plaintiff, with an agreement to resell at a certain price. The difficulty of determining whether the transaction is not a mere device to obtain security for a debt, and at the same time to escape the expense and delay of a foreclosure, has often been recognized. If A conveys to B a tract of land, in consideration of a sum of money due from or then paid to the grantor, and agrees to reconvey at a specified time, if the money is repaid, with interest, the grantor in the meantime remaining in possession, it is difficult to comprehend a motive for the transaction except upon the theory that the conveyance is security for a debt. Yet it is said: "To deny the power of two individuals capable of acting for themselves to make a contract defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price, and at a specified time, would be to transfer to the courts of chancery in a considerable degree the guardianship of adults, as well as infants": Conway's Exrs. v. Alexander, 7 Cranch (U. S.), 237, 3 L. Ed. 321. In Henley v. Hotaling, 41 Cal. 22, the negotiations and the agreement were with the agent of the borrower for a loan; but it was discovered that the warrant of attorney did not authorize the agent to execute a mortgage, but did authorize a sale. So it was arranged that the agent should make an absolute conveyance, defeasible on a day named, by repayment, with interest. This court held that it was not a mortgage, on the ground that there was no agreement, express or implied, to pay. It is said: "If there is no debt there is no mortgage. We look in vain in this case to

find any evidence of a promise on the part of Storms to repay the purchase money, or of the existence of a debt of any kind from him to Hotaling." And it is further said that, in case Hotaling brought suit to foreclose, "the answer that there was no promise, either express or implied, on the part of the alleged mortgagor, would have been a complete bar." To the same effect are Farmer v. Grose, 42 Cal. 169; Page v. Vilhac, 42 Cal. 75; Montgomery v. Spect, 55 Cal. 352; Manasse v. Dinkelspiel, 68 Cal. 404, 9 Pac. 547. The case at bar is not nearly as close a case upon this point as either of the cases above cited. In all of those cases it was plausibly argued that there was an implied promise to pay, which would create a liability at least to the extent of the property conveyed. There may be a mortgage in which the mortgagee is restricted to his lien, and cannot recover a judgment for deficiency. In this case, in addition to the fact that there is no promise to pay, there are many circumstances which rebut the presumption that either party supposed that the deed was held as security. (1) The payee had commenced suit to foreclose, because he believed the security insufficient. Further time would have been given if further security could have been had. (2) The amount to be paid was not the amount of the debt, but more than $5,000 less. (3) No interest was to be paid. (4) The grantee took immediate possession. True, the defendant continued to occupy the house and barn under the agreement for six months, but the beneficial use passed at once to the grantee. (5) It was supposed that it would cost $1,500 to cultivate the orange orchards. As defendant was authorized to sell at any time, plaintiff might not be able to gather the crop. In that case he would lose this expense. And (6) all the circumstances show that the arrangement was simply in pursuance of an agreement to give defendant the exclusive privilege of selling as plaintiff's agent for six months, with the right to retain all over $21,000 as commissions. Such, indeed, are the allegations of defendant's answer, and such is the testimony. Plaintiff thought the land only worth that sum, and was willing to take that for it. Defendant naturally valued it much higher, and was sure he could get more for it. Nothing was more natural, then, than that plaintiff should employ defendant to sell. The option was for a limited period. If the pre-

sumption which it seems to me naturally arises in such transactions can be rebutted, I think it is in this case. There was no error in not finding whether the land was worth $35,000 or not. If true, this was a mere probative fact. Nor do I think the record shows that there was any evidence that it was worth that sum. I think the judgment and order should be affirmed.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

TOWNSEND v. BRIGGS.*

No. 14,889; February 21, 1893.

32 Pac. 307.

Assault.—In an Action for Personal Injuries It Appeared that plaintiff entered defendant's shop and was ordered out; that, as plaintiff stepped back to the door, defendant struck him several times on the head with a mallet and with his fist, which caused plaintiff to fall on a cutting machine, and injure his left arm so that it had to be amputated. Held, that a verdict for plaintiff was justified by the evidence.

Assault—Damages.—In Such Action, a Verdict of $9,000 was not so excessive as to show bias or prejudice.

Witnesses.—It was not Prejudicial Error to Allow Plaintiff to Answer the preliminary question: "You may state whether or not you have ever received any injury caused by . . . . defendant," when there follows, without objection, a narration of how the injury was received, and what was said and done by defendant.

Damages for Personal Injuries.—It was Proper to Allow Plaintiff to Testify that he had formerly lost two fingers on his right hand, and to show his hand to the jury, since they should know to what extent the loss of his left arm had deprived him of his earning power.

Damages for Personal Injuries.—It was Proper for Plaintiff's Physician to testify that he told plaintiff of his condition, and that it was necessary to amputate his arm, since the mental suffering re-

*For subsequent opinion in bank, see 99 Cal. 481, 34 Pac. 116.

sulting therefrom was attributable to defendant, if he was the cause of the injury.

Witnesses—Cross-examination.—Where a Life Insurance Agent was called to testify that the mortuary tables in an encyclopedia are in general use, and was not asked on his examination in chief to whom the tables applied, but stated on cross-examination that they applied only to insurable persons, it was not proper cross-examination to ask him "what insurable persons are."

Witnesses.—Defendant's Questions: "Do You Know his [plaintiff's] habits as to sobriety?" and "Do you know what his reputation is for sobriety?" were incompetent, as they called for the witnesses' knowledge at the time of the trial, which was two years after the injury was received.

Assault—Damages.—In Such Action It was Proper to Charge that, "if the jury find from the evidence that defendant, from malicious motives, and a wrongful disregard of" plaintiff's rights, "assaulted him and beat him wrongfully," and plaintiff was injured, "directly or approximately, then plaintiff is entitled to recover all damages he has suffered thereby," and the amount of damages is for the jury alone to determine.

New Trial — Prejudice of Jurors.—Where a New Trial was Asked for because two of the jurors were prejudiced against defendant, and affidavits are read as to statements made by the jurors showing their prejudice, which statements are denied by the jurors in counter-affidavits, the action of the court in denying the new trial will not be disturbed.

APPEAL from Superior Court, Ventura County; B. T. Williams, Judge.

Action by Charles Townsend against J. S. Briggs for personal injuries. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Brousseau & Thomas (Blackstock & Shepherd of counsel) for appellant; Barnes & Selby and H. L. Poplin for respondent.

BELCHER, C.—This is an action to recover damages for personal injuries received by the plaintiff. It is alleged in the complaint that on the eighteenth day of June, 1889, at San Buenaventura, in this state, the defendant wrongfully, wantonly and maliciously assaulted the plaintiff, struck him several blows on the head with a mallet, and also with his fist,

and beat, pushed, and knocked him over upon the knife of an apricot pitting machine, and thereby cut, bruised, and injured his head and left arm; that by reason of the injuries so received plaintiff lost his left arm, it being necessary to amputate the same above the elbow, and he was caused to suffer great bodily pain and mental agony, and was permanently disabled from doing any work or business, to his damage in the sum of $20,000, for which he asked judgment. The answer denied all the averments of the complaint, and alleged that the injuries complained of were received by the plaintiff through his own wrongful acts, carelessness, and negligence, while he was willfully and unlawfully trespassing upon the property of defendant, and not by or through any wrongful act of defendant. On the first trial of the case a verdict was returned in favor of the plaintiff for $500 damages. A motion for new trial was made by the plaintiff and granted by the court, and on appeal to this court the order was affirmed: Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108. On the second trial, eleven special interrogatories were submitted to the jury and answered in favor of the plaintiff. A general verdict was also returned awarding the plaintiff $9,000 damages, for which sum judgment was entered. From this judgment, and an order denying his motion for new trial, the present appeal is prosecuted by defendant.

It was proved that defendant and one Leach had a shop in San Buenaventura, in which they were manufacturing and testing machines for pitting apricots and peaches; that there were three machines standing on the floor of the shop, two of them finished and one unfinished; that about 6 o'clock in the afternoon of June 18, 1889, the plaintiff entered the shop through an open front door to see one Barnard, an acquaintance of his, who was working there; that on entering plaintiff spoke to Barnard, and immediately stepped to the machine which was nearest the door, and commenced turning the wheel of it rapidly, and then stepped to another machine and turned the wheel of that; that the turning made a rattling, loud noise, which was heard by defendant in an adjoining room, and that he at once went into the shop, and told plaintiff to let the machines alone, and to get out from there, or he would pound his head; that plaintiff stepped back near the door and said, with an oath, "I would like to see you pound me"; that de-

fendant then seized a mallet and went up to plaintiff and struck him on the head with it; that the blow caused plaintiff to fall back against the door, but that he gathered himself up and stepped forward, and as he did so defendant again struck him with the mallet several times, and then struck him with his fist; and that, while plaintiff was moving about, he fell on one of the machines, and his left arm was so badly cut by the knife of the machine that to save his life it became necessary a few days later to amputate it above the elbow. It is claimed by appellant that the verdict was not justified by the evidence, and therefore that the judgment should be reversed. In answer to this claim it is sufficient to say that there was evidence clearly tending to support the verdict and to justify the answers to all of the special interrogatories. It is true that the testimony was in many respects conflicting, but under the well-settled rule in such cases the judgment cannot, in our opinion, be disturbed on this ground.

It is also claimed that the damages allowed were excessive. But the rule is that, where damages are asked for personal injuries committed from wanton or malicious motives, the measure of damages is left largely to the discretion of the jury, and courts will not disturb the verdict on the ground that the amount allowed is excessive, unless it is so disproportionate to the injury received as to make it clear that the jury must have been influenced by passion or prejudice. Here the injury sustained was serious and lasting, and we do not think it can be said that the sum awarded was an excessive compensation for it.

It is further claimed that the court committed several errors in its rulings upon the admission of evidence which were prejudicial to the defendant. The rulings complained of were as follows: After the plaintiff had taken the stand as a witness in his own behalf, his attorney said to him: "You may state to the jury whether or not you have ever received any injury caused by Mr. Briggs, the defendant in this action." The question was objected to as incompetent, because it called for a conclusion, an ultimate fact, to be determined by the jury, and not by the witness. The objection was overruled, and the witness answered, "I have received it." We see no prejudicial error in this ruling. The question was merely preliminary, and the answer was followed, without objection, by

a narration of the facts showing how the injury was received, and what was said and done by the defendant. The attorney also said to the same witness: "You may state to the jury the condition of your other hand prior to and at the time you received this injury." The answer was: "I have only two fingers and a thumb. I lost them in 1869." The attorney then said, "Hold your hand up, and show to the jury." It was objected that the evidence sought was immaterial, irrelevant and incompetent, and it is argued that the purpose and effect of it was to excite the sympathy and prejudice of the jurors. But the plaintiff was entitled to have the jury informed as to his physical condition, and to what extent the loss of his left arm had deprived him of the means of earning a livelihood. For this purpose, as we understand it, the evidence was introduced, and it seems to have been competent and proper.

Dr. Bard was called as a witness for the plaintiff, and testified that he was a physician and surgeon, and was called upon to dress the plaintiff's wounds; that ten days after the injuries were received he, with other consulting physicians, decided that it was necessary that the arm should be amputated, and that on the next day he amputated it. He said: "His condition at the time of the amputation was very critical. It was necessary to amputate the arm to save his life. He received proper medical attention and good nursing." He was then asked: "Did you notify Mr. Townsend of his critical condition that you have mentioned?" and the answer was: "I did notify him of his critical condition, and obtained his consent to the amputation." The question was objected to by defendant as incompetent and immaterial, and it is now urged by his counsel that the doctor's expression of his opinion to his patient was incompetent as against the defendant, because, as they say, "it may be that it had a depressing effect on the plaintiff's mind at the time, but such suffering cannot be attributed to the defendant." We see no merit in this objection. It was natural and proper for the doctor to tell the plaintiff of his condition, and that it had become necessary to amputate his arm; and the physical and mental suffering resulting therefrom was clearly attributable to the defendant, if he was the cause of the injury.

John H. Reppy was a witness for plaintiff, and testified that he had been engaged in the life insurance business as agent of the Mutual Life of New York for four years, and that the American Mortuary Tables were used by the leading life insurance companies; that he had compared the American Mortuary Tables, of which he had a copy, with the American Experience Tables, found in volume 3 of Johnson's New Universal Encyclopedia, so far as they related to the age of forty-six—the plaintiff's age at the time he received the injury—and that they were identically the same. Plaintiff then offered and read in evidence, over the objection of defendant, the page in the encyclopedia showing the probable duration of life at the age of forty-six to be twenty-three and eighty-one hundredths years. On cross-examination the witness stated that he had been a soliciting agent in the life insurance business, but had made no examinations of applicants for policies; and that the table referred to applied only to insurable persons. He was then asked, "Can you tell us what insurable persons are?" The question was objected to by plaintiff as not proper cross-examination, and the objection sustained. It is argued that this ruling was erroneous, because, if the witness had answered in the affirmative, and had said that plaintiff was not an insurable person, defendant would then have been entitled to demand that all his evidence be stricken out; and, if he had answered in the negative, defendant could properly have made the same motion. But the witness was called to prove simply that the mortuary tables found in the encyclopedia were in general use, and on his direct examination had been asked no questions as to whom the tables applied, or as to who were or were not insurable persons. And the general rule is that a witness cannot be cross-examined except as to facts and circumstances connected with matters testified to by him on his direct examination. There was no error, therefore, in the ruling of the court. The objection that the mortuary tables were not admissible in evidence is not insisted upon, nor could it be successfully. It had already been proved that plaintiff was in good health at the time he received the injury; and the rule seems to be general that, in an action to recover damages for an injury to a healthy person, caused by the negligence or wrongful act of the defendant, where the injury has resulted in the death of

the injured party, or in practically destroying his earning capacity, standard mortuary tables are admissible to show what was his probable duration of life, and thus to assist in determining what amount of damages would be reasonable and proper in the case: Gallagher v. Railway Co., 67 Cal. 16, 56 Am. Rep. 713, 6 Pac. 869; 15 Am. & Eng. Ency. of Law, p. 881, note 3, and cases cited.

When defendant was making his own case he asked one of his witnesses, "Do you know his [Townsend's] habits as to sobriety?" and another witness, "Do you know what his reputation is for sobriety?" Both questions were objected to as incompetent, and the objection sustained. The questions called for the knowledge of the witnesses at the time of the trial, which was two years after the injury complained of was received, and they were therefore clearly immaterial and incompetent.

It is next claimed that the court erred in giving to the jury certain instructions asked by the plaintiff. The first instruction complained of reads as follows: "If the jury find from the evidence that the defendant, from malicious motives, and a wrongful disregard of the rights of the plaintiff, assaulted him and beat him wrongfully, and in so beating the plaintiff was injured thereby, directly or approximately, then plaintiff is entitled to recover all damages he has suffered thereby, and the measure of damages and the amount thereof would be for you alone to determine under the evidence and instructions given by the court in this case." It is said that "this instruction assumes the fact that, if the defendant did assault the plaintiff, such assault was from malicious motives, and the wrongful disregard of the rights of the plaintiff." We fail to see any such assumption; on the contrary, the instruction seems properly to leave to the jury the determination, from the evidence, of all the matters referred to. Similar objections are made to other instructions, but we see no merit in them, and therefore pass them without special notice. The instructions asked by the defendant were all given, and when read, as they must be, in connection with those given at the request of the plaintiff, the law applicable to the case seems to have been fully, fairly and correctly stated.

Finally, it is claimed that a new trial should have been granted, because two of the jurors before whom the case was

tried were prejudiced against the defendant, and had made statements showing that they were wholly disqualified to act as jurors in the case. The jurors referred to were E. P. Cook and P. K. Miller, and the defendant, in an affidavit made by himself, stated that he "did not know before said jurors were called and sworn, touching their qualifications to serve as jurors in said case, or before they were so accepted as such, that they were so prejudiced against him. And that he had no means of knowing of such prejudice and ill-will." He did not state, and there was no proof, that the prejudice of the jurors, if any existed, was not known to him and his attorneys before the trial was concluded and the case submitted. Such proof, however, should have been made. But, waiving that, we do not think the action of the court in denying the motion for new trial can be disturbed on this ground. It is true that several affidavits were read in support of the motion, in which the affiants stated that in conversations with Cook and Miller, at times and places named, the latter had made statements to them, which, if true, clearly showed that they entertained prejudice and ill-feeling against Briggs. But, on the other hand, counter-affidavits made by Cook and Miller were read in which they denied that at the times or places named, or at any time or place, or at all, they had ever made to the affiants, for defendant, or in conversation with them, the statements charged, or any statements of like or similar import, nature, substance or character. Counsel for appellant suggest that the counter-affidavits are insufficient, because they only deny that the affiants ever made the statements charged to or in conversation with the affiants on the other side. And it is said that the statements may have been made in the hearing of, if not to, or in conversation with, the parties deposing to them. But, in our opinion, there was a real and substantial conflict as to whether the said statements or any like statements were ever made, and, after carefully reading all of the affidavits, we cannot say that the conclusions of the court below, as shown by its action in denying the motion, were not reasonable and proper. We advise that the judgment and order appealed from be affirmed.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HOOPER v. PATTERSON et al.

No. 14,394; February 25, 1893.

32 Pac. 514.

Appeal—Time for Taking.—An Appeal from a Judgment should be dismissed where it is not taken until more than two years after the entry thereof.

Injunction Bond—Action on by Administrator—Attorney Fees. In an action by an administrator on an injunction bond, the amount of attorneys' fees paid by the intestate in procuring a dissolution of the injunction cannot be recovered, when such fees have not been paid, and no claim for them had been filed against the estate, at the time of filing the complaint.

Injunction Bond—Action on—Interest.—In such action, it is error to allow interest on the damages from the date of filing the complaint, as such damages are unliquidated and uncertain until settled by process of law, or by the parties.

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

Action by W. N. Hooper, as administrator of Terence Burke, deceased, against James Patterson and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Appeal from the judgment dismissed. Order denying a new trial reversed.

Wm. H. H. Hart for appellants; T. V. O'Brien, O'Brien & Morrison and O'Brien & Dangerfield for respondent.

VANCLIEF, C.—Action upon two injunction bonds to recover $5,000 damages alleged to have been sustained by plaintiff's intestate, by reason of the injunctions. The plaintiff had judgment for $500, with interest thereon from February 29, 1884 (the date of filing original complaint), until the date of judgment, May 4, 1889, and costs, taxed at $188.20. The defendants appeal from the judgment, and from an order denying their motion for a new trial. The appeal from the judgment should be dismissed, as it was not taken until September 23, 1891—more than two years after the entry of the judgment.

The two injunction bonds were given in the same action. The first injunction having been dissolved on demurrer to the complaint, the second, to the same effect, was granted upon an amended complaint and a second bond. A demurrer to the amended complaint, upon which the second injunction was issued, was also sustained, and thereupon final judgment, dismissing the complaint and dissolving the injunction, was rendered. From this judgment, an appeal was taken, whereupon the judgment and order dissolving the injunction were affirmed: See Hall v. Thiesen, 61 Cal. 525, 527. The injunction restrained plaintiff's intestate and the sheriff of El Dorado county, pendente lite, from selling, on execution in favor of the former, certain mining claims, and improvements thereon. The findings of the court negative all alleged damages by reason of the injunction, except as follows: (1) "That said Burke (plaintiff's intestate) was necessarily put to costs and expenses, in the amount of $500, for attorneys' fees in procuring the dissolution of said injunctions, and expended said sum." (2) "That said Burke was necessarily put to cost and expense, in the amount of $200, for attorneys' fees in the supreme court of the state of California, in procuring an affirmance of said judgment dissolving said injunctions."

1. It is contended for appellant that neither of these findings is justified by the evidence. I think this point should be sustained. The evidence not only fails to show that Burke or his administrator ever paid any attorneys' fees for services in procuring a dissolution of either injunction, but positively shows that no such fees were ever paid, and, furthermore, shows that the estate of Burke was not liable for any such fees at the time the amended complaint, on which the case was tried, was filed, for the reason that no claim for any such fees was ever presented for allowance to the administrator of Burke, or to the probate judge. The plaintiff was appointed and qualified as administrator of Burke more than four months prior to the filing of the original complaint herein, and nearly two years before the filing of the last amended complaint; and it appears that notice to the creditors had been duly published by the administrator. Substantially all this appears from the testimony of Thomas V. O'Brien, a witness for plaintiff, who appears to have been the

leading attorney for Burke in the action in which the injunctions were issued, and also in this action; and there was no other evidence on the trial, touching attorneys' fees for services in procuring a dissolution of the injunctions, than this testimony. In the late case of Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833, this court said: "The allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional; and it should not be carried beyond the point to which former decisions have taken it." By former decisions in this state, it seems to have been well settled that in cases of this kind attorneys' fees cannot be recovered as damages sustained by reason of the injunction, unless they have been paid. The principal former decisions to this effect are to be found in the following cases: Willson v. McEvoy, 25 Cal. 170; Prader v. Grimm, 28 Cal. 11; Roussin v. Stewart, 33 Cal. 208; Bustamente v. Stewart, 55 Cal. 115.

2. Appellant also makes the point that the court erred in allowing interest on the damages, and I think this point is well taken. The liability of the defendants, if any, arose from a contract; but the amount of the damages could not have been estimated or ascertained by means of the contract; nor does the contract furnish any data useful as a factor in estimating the damages. Therefore, the damages were unliquidated and uncertain, and could only be made certain by proof and adjudication on the trial, or by a settlement between the parties: Coburn v. Goodall, 72 Cal. 509, 1 Am. St. Rep. 75, 14 Pac. 190; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67.

I think the appeal from the judgment should be dismissed; but that the order denying a new trial should be reversed, and a new trial granted. But inasmuch as it appears that the attorneys for defendants refused to accept an offer of plaintiff's attorneys to consent to an order granting a new trial, made at the time notice of defendants' motion for a new trial was served, I think the appellant should pay the costs of the appeal.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed and the order denying a new trial is reversed and a new trial granted. Costs of appeal to be paid by appellant.

WILEY v. CALIFORNIA HOSIERY CO.

No. 14,386; March 6, 1893.

32 Pac. 522.

Traveling Salesman—Action for Discharge—Evidence.—A written proposition by defendant to plaintiff recited that "we will pay you a commission of seven and one-half per cent on all orders taken by you and shipped by us between this date and October 31, 1887. You are not to pay out any money or contract any obligation of whatever nature for us, nor represent us in any legal proceeding of any kind or in any place, unless specially authorized in writing so to do. Your duty to us is to take orders for our goods. We reserve the right to decline such orders as we may not want to fill"; and the same was orally accepted by plaintiff. Held, in an action by plaintiff for a wrongful discharge, that oral evidence was inadmissible to change or enlarge the terms of the contract thus made, except as to matters necessarily implied in it or necessary to its performance.[1]

Traveling Salesman—Action for Discharge—Evidence.—In such action plaintiff is not entitled to recover the specified commission on the amount of goods sold by other salesmen for defendant in territory in which plaintiff claimed the exclusive right to sell for it, since he had not such privilege under the contract.

Traveling Salesman—Action for Discharge—Commissions.—The fact that plaintiff, for three years preceding such contract, had solicited orders for defendant in such territory would not entitle him to such privilege, and evidence of such fact is inadmissible.

Traveling Salesman—Discharge from or Quitting Service.—In such action plaintiff admitted that he took orders at prices below those given to him by defendant, and without its express permission, and that, when he told defendant's secretary that he could not get such prices of certain persons, he said, "You have got to get these prices for the goods, or else not sell them, and the goods have to bring that price this year." The evidence showed that defendant wrote plaintiff several times protesting against his taking orders at cut prices, and finally wrote him that "we will have no man working for us in any manner who will not take our instructions. Because you have been with us a long time, we again give you your choice of doing as we want you to do, or return our samples and reference

[1] **Cited** in Amherst Inv. Co. v. Meacham (Wash.), 124 Pac. 682, as authority for the principle that a contract signed by only one party, but accepted and acted upon by the other, is as obligatory upon this other as though he had signed it in the first instance.

book"; and that plaintiff replied that "you have been the only violators of the contract, and I defy you to show a point wherein I have not fulfilled it to the letter. In your letter of July 7th, you state I may consider myself no longer in the employ of your company. I consider a full discharge." Held, that plaintiff voluntarily quit defendant's employ, rather than comply with reasonable instructions, and the evidence did not support a verdict for plaintiff.

Traveling Salesman—Action for Discharge—Damages.—An instruction in such case that, if the jury found for plaintiff, they should find the amount of defendant's goods plaintiff would have sold during the remainder of his term of employment, and allow seven and one-half per cent thereon, is erroneous, since it fails to take into account plaintiff's expenses, which should be deducted therefrom.

Traveling Salesman—Action for Discharge—Commissions.—In such action plaintiff testified that he told defendant's secretary that he could not sell their goods alone for less than ten per cent and the former promised him a side line of flannels; that "I said that is just what I wanted, and on the strength of that we entered into this contract. I told him I was to have a line of gloves in connection with defendant's goods." Held, that plaintiff was not entitled to recover for commissions that he would have made on the sale of gloves during the remainder of his term of employment, in the absence of any other evidence of a contract with defendant in relation thereto.[1]

Traveling Salesman—Action for Discharge—Evidence.—In such action evidence of a usage by which plaintiff was allowed, in his discretion, to make reductions within certain limits from the price list, in so far as the same was inconsistent with the written agreement and positive instructions of defendant, was inadmissible.

Traveling Salesman—Action for Discharge—Commissions.—In such case the rule for estimating the amount of sales plaintiff would have made during the remainder of his term of employment should be based on the sales made during the part of the term which had expired at the time of the discharge, modified by the facts as to whether the sales would be greater or less during the early or later period.

APPEAL from Superior Court, City and County of San Francisco; Eugene Garber, Judge.

[1] Cited as one of many cases in Emerson v. Pacific Coast & Norway Packing Co., 96 Minn. 8, 113 Am. St. Rep. 603, 1 L. R. A., N. S., 445, 104 N. W. 576, tending by their "letter and spirit," to the effect that an "agent discharged before the expiration of his term, without just cause, is entitled to have the jury consider as an element of his damages his commissions on the amount of new business written by the defendant within his period through a new agent for the unexpired term."

Action by Thomas Wiley against the California Hosiery Company to recover damages for a wrongful discharge of plaintiff as defendant's traveling salesman. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

P. Reddy and W. H. Metson for appellant; S. H. Regensburger and P. F. Dunne for respondent.

HAYNES, C.—Action to recover damages for an alleged breach of contract. A jury trial was had, and the plaintiff obtained a verdict and judgment for $1,000 damages. The appeal is from this judgment and an order denying defendant's motion for a new trial. The complaint alleged that on February 10, 1887, plaintiff and the defendant (a corporation) mutually agreed that plaintiff should serve the defendant from that date until October 31, 1887, as a traveling salesman to sell and take orders for defendant's goods, for which plaintiff was to receive a commission of seven and one-half per centum, and pay his own expenses; that, as a further inducement, defendant was to give plaintiff the exclusive right to sell its goods in Utah, Colorado, Nebraska, Wyoming, New Mexico and Kansas; and, as breaches of this agreement, plaintiff alleged that in May, 1887, defendant, while plaintiff was faithfully discharging his duties, sent another salesman to Salt Lake City and Ogden, in Utah, who made sales in those places amounting to $2,500, and that on July 1, 1887, the defendant wrongfully discharged plaintiff; that thereby he was prevented from selling at least $20,000 of defendant's goods; and, as another element of damage, plaintiff alleged that, as part of his said agreement and of the consideration thereof, defendant agreed that plaintiff should have the privilege of carrying for sale a line of gloves manufactured by another house, upon which he was to receive ten per centum commission, he paying his own expenses, but that he could not carry the gloves alone to make a profit or cover expenses; and that by his discharge he was prevented from selling gloves to the amount of $3,000, and demanded judgment for his commission on the $2,500 sold by another in Utah, and upon the $20,000 of defendant's goods he could have sold during the

remainder of his term of service, at seven and one-half per centum, and upon the prospective sale of gloves, at ten per centum—in all $1,987.50. The answer of defendant specifically denied each material averment of the complaint, and for a further answer set out the written proposal of defendant to plaintiff for his employment, and under which he entered defendant's service, and which is as follows:

"Oakland, California, Feb. 10, 1887.

"Thomas Wiley:

"We will pay you a commission of 7½ per cent. on all orders taken by you and shipped by us between this date and October 31, 1887. You are not to pay out any money or contract any obligations of whatever nature for us, nor represent us in any legal proceeding of any kind or in any place, unless specially authorized in writing so to do. Your duty to us is to take orders for our goods. We reserve the right to decline such orders as we may not want to fill.

"CALIFORNIA HOSIERY CO.
"JOHN WILLIAMS,
"Secretary."

The answer further alleged that plaintiff accepted the proposal and entered upon said employment the same day, and was furnished by defendant with samples and a list of the prices at which he should sell defendant's goods; that in May and June, 1887, plaintiff took orders at reduced prices, whereupon defendant notified him that, unless he would promise in writing to be governed by the price lists, he should quit defendant's service; that he did not inform defendant that he would be governed by such price lists, but, on the contrary, notified defendant that he would quit its service; and that the contract between them was ended July 17, 1887. A great many exceptions were taken by defendant to adverse rulings upon the admission of testimony, and to instructions to the jury given and refused; and it is also specified that the verdict is not justified by the evidence in several particulars. It is not necessary to notice these specifications in detail. The discussion of some of the controlling questions must suffice.

The verdict in favor of plaintiff must have been based on a finding that plaintiff was wrongfully discharged. It is true that it is alleged in the complaint that defendant violated

the agreement by sending another man into his territory, and taking orders to the amount of $2,500. This occurred in May, and plaintiff's letter to defendant dated May 21st showed that he then had knowledge of the sales made by Deane in Utah, but plaintiff continued in the service of defendant after the knowledge of this alleged violation of the agreement until July. Besides, this violation of the agreement, if it were such, was capable of exact compensation; and, as it was not alleged or claimed that such violation was continued or threatened to be continued, it could form no just excuse for the abandonment of the contract by plaintiff. But we do not find in the record any evidence which would justify a finding that plaintiff was to have the exclusive right to sell in the states and territories named. It is conceded by plaintiff that nothing was said upon that subject at the time the agreement was made, but it is said that, for three years preceding, plaintiff had solicited orders in those states and territories for defendant, and it seems to have been assumed by plaintiff that he was to have the exclusive right in those states and territories in 1887. The evidence, however, in relation to this matter could only be material as tending to support the charge that defendant had violated its agreement. As this agreement was in writing, we think no oral testimony could be received to change or enlarge its terms, at least in matters not necessarily implied in it, or necessary to its performance by either party. The verdict of the jury must therefore be sustained, if at all, upon the assumption that plaintiff was wrongfully discharged by defendant; and upon this point it is clear the verdict of the jury cannot be sustained. It is admitted by plaintiff that he took orders at prices below those given to him, and without express permission from the defendant. He claims, however, that the reductions made upon certain orders were made under and in accordance with a usage of defendant by which he was allowed to use his discretion, within certain limits, to make reductions from the list prices upon certain orders for more than a specified quantity of particular kinds of goods. He testified that he knew, as matter of fact, in 1887, when A–1, six of the same kind in a box, were sold, the course of business was to give the buyer fifty cents reduction; but he testified that at the time of the agreement of February 10th he said to Williams, "I won't be able to sell

these goods in Wyoming to B. Hellman & Co. at the advanced figures." Mr. Williams said: "You have got to get these prices for the goods, or else not sell them, and the goods have to bring that price this year." He further testified "that it meant the price of every article to be sold by him—for which he should sell it only as modified in writing or some way in a proper communication." The witness further testified that all he had stated concerning usage was based upon a memorandum in writing, written by Mr. Williams in a little book which he received in 1885. Shortly after plaintiff entered upon defendant's employment he was expressly authorized, in writing, to cut prices within certain specified limits on two classes of goods; but plaintiff conceded that he had no instructions to cut on other goods. The instruction was: "When strictly necessary, you may cut A–1 and 1,935 to $18.00; but the twenty gauge must be held where they are, at $16.50." He admitted that he cut A–1 to $18, 2–12 in a box, and to $17.50, 6–12 in a box (six of one size in a box); that the writing was in English, and that he understood it to cut to $18, and regarded it as the positive instruction of his employer to cut to $18, and no more; that he had no instructions to cut on 1,995, but that he cut that number from $16.50 to $16, 6–12 in a box, but admitted he did not know of 1,995 ever being out in 6–12 boxes. We can see from the testimony of plaintiff no evidence of usage justifying a departure from the list prices given him by defendant. Indeed, his own testimony showed that he was never at any time authorized to make changes in prices because of any usage. The very fact upon which he relies to establish a usage was based upon a written instruction in 1885. This instruction was not renewed in 1887, but, on the contrary, he admits that he was informed at the time of his employment that the goods that year must bring the prices marked, and these instructions he admits were positive and clearly understood. We therefore conclude that there was no evidence of usage or otherwise which justified the defendant in cutting prices upon any of these goods, except as to the two classes named in defendant's letter of March 24th, which specified distinctly the extent to which, as well as the circumstances under which, such reductions might be made.

On June 11th defendant wrote plaintiff, among other things saying: "Where is your authority for cutting prices? We have written to B. Hellman that we will not fill his order except at regular prices. You are the only salesman who finds it necessary to cut. If you cannot get an order without cutting, do not hurt yourself and us by cutting the price, and then having us to reject the orders for that reason. . . . . You must get full prices, or else you must give up. We will not send you any more samples until you notify us that you will not cut prices without authority. If you do not do that, please send us our samples by freight at once." In another letter, written the same day by defendant to plaintiff, it was said: "You cut prices again to J. E. Miller and to Myers & Nessly, of Lincoln, Nebraska. We will not fill the orders except at the regular prices given you. We must reiterate, prices must not be cut. Our goods can be sold in your territory without cutting. If you do not sell them we will do it ourselves, but we will do nothing until you have had an opportunity to decide whether you will return the samples or not. July 1st will be the end of our limit." On July 7th defendant wrote plaintiff acknowledging receipt of five orders, and calling plaintiff's attention to the fact that he had not answered defendant's letters of June 11th, and added: "We wrote you then that you would have until July 1st to decide whether you would return our samples, or promise to stop cutting prices. You have neither returned the samples nor written a line in answer to the letters. We do not, therefore, consider that you are now in any manner in our service." Following these letters we find in the record a letter from plaintiff to defendant, bearing date Salt Lake City, July 11, 1887, but evidently written at a much later date, saying: "Your letters of June 11th and also letters of July 7th were received, and contents noted. To answer them fully and satisfactorily to you and myself, it would, according to my judgment, require a personal interview, which I trust will take place on early date. . . . . I shall not, in opposition to your wishes, take any orders here until I fully hear from you." On July 15th defendant wrote plaintiff, in reply to plaintiff's letter above mentioned, advising him that it was not necessary to have a personal interview, and again saying that he had been cutting prices without authority, and that, when written

to about it, had not said a word one way or the other, and added: "For such an offense as this, we would discharge any man working on a salary. It is something that we cannot permit, and we know that it is not necessary. . . . . We do not like this uncertainty, and it puts us to a great deal of trouble to make new arrangements. We will have no man working for us in any manner who will not take our instructions. Because you have been with us a long time, we again give you your choice of either doing as we want you to do, or return our samples and reference book." To this letter plaintiff replied under date of August 2d, and, after discussing the matter of cutting prices, and the sales made by Deane at Salt Lake City and Ogden, said: "You have been the only violators of the contract, and I defy you to show a point wherein I have not fulfilled it to the letter. In your letter of July 7th you state I may consider myself no longer in the employ of your company. I consider a full discharge." It is perhaps immaterial, so far as the merits of the case are concerned, whether plaintiff was discharged by defendant, or he preferred to quit defendant's employment, rather than to give any assurance that he would not disobey their positive instructions. We think it is clear, however, that the circumstances fully justified the defendant in discharging plaintiff; but that, notwithstanding the defendant's language in its letter of July 7th, that "defendant did not consider himself longer in their employ," the subsequent letter again renewed the offer to continue in their service upon his complying with their request. That request being reasonable, under the circumstances, we are led to conclude that the plaintiff voluntarily, and without sufficient reason, quit the defendant's employ. We conclude that the evidence is not sufficient to justify the verdict, and that the motion for a new trial should have been granted. We also think the verdict was against the instructions of the court, as given in the third, fourth, sixth, eighth, and ninth instructions given at defendant's request.

As we cannot assume that upon a new trial the evidence will be the same upon the question of defendant's liability, it is necessary to notice briefly the question of damages. The court instructed the jury as to the measure of damages substantially that, if they found for the plaintiff, they should

WEYERS v. ESPITTALIER et al.

No. 19,010; March 6, 1893.

32 Pac. 525.

Appeal—Weight of Evidence.—A verdict will not be disturbed on appeal where the evidence is conflicting.

APPEAL from Superior Court, Los Angeles County; W. H. Clark, Judge.

Action by Wilhelmine Weyers against Joseph Espittalier and Martin G. Aguirre to enjoin a sale under execution. From a judgment for plaintiff, and from an order refusing a new trial, defendants appeal. Affirmed.

W. T. Williams for appellants; Guthrie & Guthrie for respondent.

TEMPLE, C.—Appeal from the judgment and an order refusing a new trial. This action was brought to enjoin a sale under an execution against one Elise Deste, the daughter and grantor of the plaintiff. Espittalier, the judgment creditor, is made defendant with the sheriff. The answer justifies the attempted sale on the ground that the deed to plaintiff was without consideration, and was made to hinder, delay, and defraud the creditors of Elise Deste, and particularly the defendant Espittalier. The case was tried with a jury, which rendered a verdict in favor of the plaintiff. The question raised on the motion for a new trial is as to the sufficiency of the evidence to sustain the verdict. There was evidence which plainly tended to sustain it in every respect. Appellants contend that the evidence shows a state of things which would either make the plaintiff, her son in law, and her daughter partners in the transactions in which the indebtedness of Elise Deste was incurred, or that Elise Deste transacted the business for and as the general agent of plaintiff, and therefore plaintiff is herself directly responsible for the indebtedness. Conceding that such an issue is tendered in the answer, and that such facts would constitute a defense

to this action, the most that can be claimed for it is that there is much evidence which tends to support such defense. But there is also much which tends to support the other theory, that a large portion of the money invested by Elise Deste was received from her mother as a loan, and that the investments were made by the daughter in her own name and on her own account. The jury found in favor of the latter hypothesis, and we cannot disturb the verdict. A careful examination of the alleged errors occurring at the trial discloses none injurious to appellant. The judgment and order should be affirmed.

I concur: Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. HAMILTON.

No. 14,636; March 6, 1893.

32 Pac. 526.

Officer—Failure to Pay Over to Successor—Indictment.—Penal Code, section 950, provides that an information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Held, that an information, which alleged that defendant, "having theretofore" been a county clerk, and "charged with the receipt, safekeeping, transfer, and disbursement of public moneys, in his official capacity as such clerk and officer, and his official term . . . . having expired, ... and there then and there remaining in his hands certain public moneys theretofore received by him in his official capacity as such clerk," he willfully omitted to pay them over to his successor, the demand therefor "having then and there been made of" defendant by his successor, sufficiently charged that defendant, as county clerk, received money as such officer, and failed to pay it over to his successor; and

the use of the participle instead of the past tense of the verb did not make the allegations mere recitals.[1]

Officer—Failure to Pay Over to Successor—Indictment.—Penal Code, section 426, declares that the phrase "public moneys" includes all money received or held by county officers in their official capacity. Held, that an allegation that moneys were received by defendant "in his official capacity" was the allegation of a fact which fixed their character as "public moneys."

Officer—Failure to Pay Over to Successor—Indictment.—The allegation that defendant received the money in his official capacity was sufficient, without referring to the statute under which the information was drawn, or to any statute which created a duty, the antecedent existence of which constituted a factor connected with the offense; the general conclusion of the information, "contra formam statuti," being sufficient.

APPEAL from Superior Court, San Diego County; W. L. Pierce, Judge.

M. D. Hamilton was convicted of omitting and refusing to pay over to his successor in office moneys received by him as county clerk. From an order arresting the judgment, the people appeal. Reversed.

Wm. H. H. Hart, attorney general, for the people; Johnstone Jones, district attorney, E. W. Hendricks and Copeland & Daney for respondent.

HAYNES, C.—The respondent was tried and found guilty of omitting and refusing to pay over to his successor in office moneys received by him as county clerk. On the day fixed

[1] **Cited** and qualifiedly approved in People v. Hatch, 13 Cal. App. 530, 109 Pac. 1101, where it is said: "That the use of the participial form in alleging facts necessary to the statement of an offense is not to be commended we do not doubt, but it is sufficient in the face of a general demurrer, under the liberal system of pleading allowed in this state."

Cited and approved in Agar v. State (Ind.), 94 N. E. 821, where the court goes into the question elaborately, adducing many authorities, and makes the true test of sufficiency to be whether the material averments are stated with enough certainty to apprise the defendant of the nature and cause of the charge against him.

Cited, as an element in the history of the case, in People v. Hamilton, 103 Cal. 495, 37 Pac. 630, which was an appeal from the judgment upon retrial had after the former appeal.

for passing sentence, the defendant moved for a new trial, and also in arrest of judgment. The motion for a new trial was heard, but not disposed of, and the court granted an order arresting the judgment; and from this order the people appeal.

The information was drawn under subdivision 10 of section 424 of the Penal Code, which provides: "Each officer of this state or of any county, ... and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law to pay over the same, is punishable," etc. The information, omitting the title and conclusion, is as follows: "M. D. Hamilton is accused by the district attorney of the said county, by this information, of the crime of omitting and refusing to pay over money received by him under duty imposed by law to pay over the same. Committed as follows: The said M. D. Hamilton, on the fifth day of January, A. D. 1891, at the said county of San Diego, and before the filing of this information, having theretofore, for the two years immediately preceding, been an officer of said county, to wit, the clerk of the county of San Diego, and an officer charged with the receipt, safekeeping, transfer, and disbursement of public moneys in his official capacity as such clerk and officer, and his official term as such clerk and officer having expired by limitation of law, and there then and there remaining in his hands certain public moneys theretofore received by him in his official capacity, as such clerk, during the said official term as aforesaid, the sum of four thousand four hundred and twenty-two and thirty-six one-hundredths dollars, money of the United States of America, and it being his duty imposed by law to transfer and pay over to his successor in office in the office of county clerk of said county, one W. M. Gassaway, he, the said M. D. Hamilton, did willfully, unlawfully, fraudulently, and feloniously omit and refuse, neglect, and fail to pay over the said sum of money to the said W. M. Gassaway, he, the said Gassaway, being then and there the clerk of said county as aforesaid, and being the officer and person authorized by law to demand and receive the same as the successor in the office of said county clerk

to said M. D. Hamilton; the demand for the transfer and payment of the said sum of money having then and there been made of the said M. D. Hamilton by the said W. M. Gassaway, clerk of said county and successor in the said office as aforesaid; the said omitting and refusing, neglecting, and failing to transfer and pay over the said money and moneys being contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

The ground relied upon by the defendant, and upon which the court arrested the judgment, is that the information does not substantially conform to the requirements of sections 950–952 of the Penal Code. It is contended that the information is not "direct and certain, as it regards the party charged, the offense charged, and the particular circumstances of the offense charged"; this being, it is argued, one of the cases where the particular circumstances of the offense must be set forth by allegations that are direct and certain. The points urged are that there is no definite or certain allegation that the defendant was county clerk during the time named, nor that moneys remained in his hands, nor that the moneys were public moneys; that these matters are not allegations of fact, but mere recitals.

It may be conceded that the mode adopted by the pleader in stating these facts is not the best that could have been devised, but that is not required by the code, nor is there any standard by which the degree of certainty in criminal pleading is to be measured, save that provided by the code. Section 950 of the Penal Code provides that the information must contain: "(2) A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." We think that no one of common understanding could fail to know what was intended by the language used, and, besides, it would seem to be the natural and ordinary mode of expressing the fact intended. No better illustration of this can be given than that furnished by the learned counsel for respondent in the opening sentence of their brief, in giving a statement of the case for the information of this court. It is as follows: "The respondent having been the county clerk of the county of San Diego, and

his term of office having expired, and he having failed to turn over certain moneys," etc. Besides, the fact that he was clerk of the county, and had received money which it was his duty to turn over to his successor, was not an offense, nor any part of the offense. The offense consisted of the omission or refusal to turn it over to his successor; and though without the pre-existence of the fact that he was such clerk, and had received such money, he could not commit the offense, such pre-existing facts are matters of inducement, which, though required to be distinctly stated, need not be charged with the directness of the specific act which converts the innocent person into a criminal one.

The objections to the information upon which the learned judge sustained the motion in arrest of judgment were that the facts that the defendant was an officer and had received and had in his hands the moneys mentioned were not positively alleged, but were merely recitals, and that the statement that the money so in his hands were "public moneys" was a conclusion of law. The first of these objections seems to have been based upon the use of the past participle instead of the past tense of the verb. Bishop on Criminal Procedure (volume 1, section 556) says: "Where the direct averment is required, as in laying the main charge, it is usually made with the verb. But any other part of speech which reasonably conveys the idea is adequate, as the participle, and even the adverb." An illustration given by the same author is, in substance, as follows: Lawley, being found guilty of attempting to persuade one not to appear as a witness against Crooke, moved in arrest of judgment because it was not positively averred that Crooke was indicted. It was only said that "she, knowing that Crooke had been indicted, and was to be tried," did so and so; but the court held that it was sufficient. So, in an indictment, under an English statute which made punishable anyone "above the age of fourteen" who should steal an heiress, charging that the defendant, "being above the age of fourteen years," did the act, was held to contain a sufficient averment of his age: Id., sec. 557. The code requirement clearly permits, if it does not enjoin, the use of "ordinary" language in charging offenses; and the test of the sufficiency is that a person of common understanding shall be enabled to know what is intended. If, therefore, criminal

pleading must be framed in the technical language which formerly prevailed, these code provisions are vain and useless; for it would require us to resort to the same technical system of pleading abolished or rendered unnecessary by the code, in order to determine whether a fact is so alleged as to enable "a person of common understanding to know what is intended." We think it is sufficiently charged that the defendant was county clerk during the time named; that he received the money specified as such officer, and failed to pay it over to his successor.

It was further held by the learned judge that the allegation that there was remaining in his hands certain public moneys theretofore received by him in his official capacity is a conclusion of law; that the facts should have been stated which would show that they were in fact public moneys.

The fact is clearly alleged that these moneys were received by the defendant "in his official capacity." Section 426 of the Penal Code is as follows: "The phrase 'public moneys,' as used in the two preceding sections, includes all bonds and evidences of indebtedness, and all moneys, belonging to the state, or any city, county, or town, or district therein, and all moneys, bonds, and evidences of indebtedness, received or held by state, county, district, city, or town officers, in their official capacity." The allegation that these moneys were received by the defendant "in his official capacity" is the allegation of a fact which conclusively fixes their character as "public moneys." It is the official character in which the moneys are received, and not the ultimate ownership of the money, which, under the last clause of the section, makes them public moneys. The words "public moneys" might have been omitted without affecting the sufficiency of the information; but there is no inconsistency in the averment, since the kind or character of the public moneys charged to have been withheld is defined by the accompanying statement. At the most, it was surplusage, which does not vitiate. Nor could there be any difficulty in pleading an acquittal or conviction under this information in bar of a subsequent prosecution. The defendant is charged with all moneys remaining in his hands, which were received by him as clerk during his incumbency of that office. The offense is single, whether the amount be great or small; and a conviction or acquittal of that single offense

must, of necessity, bar a second prosecution, even though it be afterward ascertained that the amount in his hands was larger than that alleged in the first information.

Respondent further contends that, if the facts hereinbefore referred to were sufficiently pleaded, still the information does not state sufficient facts, because there was no law authorizing the clerk to receive deposits from litigants, and that, therefore, deposits received by him were illegally collected, and belonged to the depositors. But this question is not before us. This appeal involves only the sufficiency of the information, and the jurisdiction of the court, while this contention assumes facts which may have been given in evidence, but which could not properly be considered upon this appeal, if they were. The allegation that defendant received these moneys in his official capacity was sufficient, without referring, by title or otherwise, either to the statute under which the information was drawn, or to any statute which created a right, duty, or obligation, the antecedent existence of which may constitute a factor more or less intimately connected with the offense. As to all these, the general conclusion of the information, "contra formam statuti," is sufficient. We therefore conclude that the information is sufficient, and that the court below erred in arresting the judgment, and advise that the order arresting the judgment in said cause be reversed, and the court be directed to vacate its order directing the district attorney to prepare and file a new information in said cause, and to take such further proceedings therein as the law requires.

We concur: Belcher, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the order arresting the judgment is reversed and the court below is directed to vacate its order directing the district attorney to prepare and file a new information in said cause and to take such further proceedings therein as the law requires.

In re HARVEY.

(Appeal of CHAMPLIN.)

No. 18,004; March 7, 1893.

32 Pac. 567.

Insolvency.—On a Contest of a Claim Against an Insolvent's estate, it appeared that the insolvent had become indebted to claimant's assignor, B., for the price of certain land and merchandise, and gave him the notes constituting the claim in question. As part of the same transaction, B. gave a bond conditioned to convey the land to the insolvent on payment of the amount of the notes. Held, that the title to the land was reserved to secure the entire debt, and that the claim was properly rejected where claimant attempted to prove the full amount of the notes, without either deducting the value of the land, as required by section 44 of the insolvency act, or conveying his interest in it to the assignee.

Insolvency.—Costs Incurred in Wrongful Attachment against the estate of an insolvent cannot be recovered, under section 65 of the insolvency act, as said section applies only to costs which would have been a legal charge.

APPEAL from Superior Court, Modoc County; G. G. Clough, Judge.

Proceedings in the matter of the insolvency of T. M. Harvey. Certain orders were made refusing claims presented by George Champlin, and settling the assignee's account, from which Champlin appeals. Affirmed.

M. P. Chipman and D. W. Jenks for appellant; W. Rigby and J. J. May for assignee; E. E. Copeland for insolvent.

TEMPLE, C.—This appeal is from two orders made in the proceedings in the matter of the insolvency of T. M. Harvey. By one order the court refused to allow two claims presented by the appellant against the estate of the insolvent. By the order it settled the final account of the assignee, and distributed the proceeds of the estate, without considering the objections of appellant to the account or the proposed order. As appellant had no interest in the insolvent's estate after his

two claims were rejected, it is obvious that, if the first order was correctly made, appellant was not injured by the second. It does not appear when the proceedings in insolvency were commenced, but the adjudication was made at the instance of the creditors of T. M. Harvey, September 19, 1890. On the 2d of November, 1890, Champlin filed his claims, verified by his affidavit, as required by the insolvent act. Upon notice given by the assignee that he would contest the claims, the matter was submitted upon affidavits, and the claims were held not provable against the insolvent and rejected. Among others, the affidavit of T. M. Harvey, the insolvent, was read, from which it appeared that the insolvent and J. L. Harvey became indebted to one J. H. Beecher on the twenty-seventh day of September, 1889, in the sum of $4,110, for certain merchandise and for a lot in the town of Adin, county of Modoc. For this sum the debtors gave three notes, each payable to the order of the makers, and then indorsed by them and delivered to said Beecher. They were all payable one day after date. At the same time, and as part of the same transaction, and as part consideration for the notes, Beecher executed and delivered to them his bond, conditioned "that, if the above bounden obligor shall on or before the 1st day of August, 1891, make, execute, and deliver unto said T. M. Harvey and James L. Harvey (provided that the said T. M. Harvey and James L. Harvey shall on or before that day have paid to the said obligor the sum of four thousand one hundred and ten dollars gold coin of the United States of America) a good and sufficient conveyance," etc. Beecher, of course, retained the title to the land, and, so far as shown, still retains it. In June, 1890, affiant states, Beecher transferred the notes to Champlin, who is his brother in law, and who took the notes with full notice of all the facts. On the 18th of July, 1890, Champlin commenced a suit upon the notes in the superior court of Tehama county, and caused an attachment to be issued, which was levied upon the property of the insolvent in the county of Modoc. Just two months afterward T. M. Harvey was adjudged an insolvent. A motion was made in the court in which the attachment suit was pending to dissolve the attachment on three grounds: (1) The indebtedness was secured; (2) was not due; and (3) T. M. Harvey had been adjudged an insolvent. When the motion

was made does not appear, but it must have been after the adjudication. It was granted November 12, 1890. The order dissolving the attachment does not state upon what ground it was dissolved, but it is evident that the attachment was improperly sued out, for the land was held in trust as security for the debt even in the hands of Beecher's assignee: Gessner v. Palmateer, 89 Cal. 89, 13 L. R. A. 187, 24 Pac. 608, 26 Pac. 789. Besides, if the insolvency proceedings had been commenced within one month after the attachment, the adjudication would have ipso facto operated as a dissolution, and no such motion would have been required.

Appellant's affidavit denies that appellant knew of the existence of the supposed security when he purchased the notes, and he contends that the value of the lot is much less than the debt, and that the purchase price of the land formed an inconsiderable part of the consideration for the notes. By the terms of the bond, however, which may be considered a declaration of a trust by Beecher, it is evident that the Harveys would be compelled to pay the entire debt before they could demand a deed. If, therefore, the bond constituted security for the payment of the notes, in the hands of the assignee, at all, it was for the full amount. Appellant did not attempt to prove his claim for the balance of the debt after deducting the value of the security, as provided in section 44 of the insolvent act. Indeed, he could not do this unless he could agree with the assignee as to the value of the security. But he made no effort in that direction, for he claimed that he had no security, and was entitled to prove his full debt. Of course, for the same reason, he did not convey his claim upon the property to the assignee, and permit the property to be sold under the order of the court. The claim, therefore, was properly rejected by the court.

The second claim presented by Champlin against the estate of the insolvent was for $713.33, being the costs incurred in the attachment proceedings. It is evident that the attachment was wrongfully sued out. Under such circumstances appellant could not have recovered such costs from the defendant if he had not been adjudged an insolvent. As the proceedings in insolvency are for the purpose of appropriating the property of the insolvent to the payment of his debts, it must follow that such costs could not be allowed against his

estate. The provisions of section 65 of the insolvency act can only apply to costs which would have been a legal charge against the insolvent. I think the order should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the orders are affirmed.

VON SCHMIDT v. WIDBER, Treasurer.

No. 14,935; March 8, 1893.

32 Pac. 532.

Appeal Bond—When Required.—A County Officer, against whom suit has been brought, is not exempted from filing an undertaking on appeal by Code of Civil Procedure, section 1058, declaring that in any civil action wherein the state is plaintiff, or any state officer in his official capacity or on behalf of the state, or any county, city, or town, is plaintiff or defendant, no undertaking shall, as to such parties be required.[1]

APPEAL from Superior Court, City and County of San Francisco; A. A. Sanderson, Judge.

Action by A. W. Von Schmidt against James H. Widber, treasurer of the city and county of San Francisco. Judgment for plaintiff. Defendant appeals. Dismissed.

John H. Durst for appellant; Tilden & Tilden for respondent.

PER CURIAM.—This is a motion to dismiss an appeal from the judgment rendered in favor of respondent in the above-entitled action upon the ground that no undertaking upon appeal has ever been filed. Upon an examination of

[1] **Cited** with approval in State v. Bechtner, 132 Wis. 636, 113 N. W. 43, where the court discusses a statute of Wisconsin similar to that of California as to the exemption of county officers from the rule in regard to appeal bonds.

the record we find no bond upon appeal was ever filed. A county officer is not exempted from filing an undertaking on appeal by virtue of the provisions of section 1058, Code of Civil Procedure. Let the appeal from the judgment be dismissed.

GREGORY et al. v. GREGORY et al.

No. 18,080; March 9, 1893.

32 Pac. 531.

Appealable Orders.—Where a Judgment is Itself Appealable, and no motion is made for a new trial, an appeal from a subsequent order refusing to set the judgment aside will not lie. Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175, followed.

APPEAL from Superior Court, Placer County; W. H. Grant, Judge.

Action by James W. Gregory and others against John H. Gregory and others. Judgment for defendants. Plaintiffs appeal from an order refusing to set the judgment aside. Dismissed.

James Gartlan for appellants; E. P. Tuttle and C. Tuttle for respondents.

BELCHER, C.—This case was submitted to the court below for decision upon an agreed statement of the facts, signed by the attorneys of the parties thereto, and on February 25, 1892, judgment was given and entered by the court in favor of the defendants. Thereafter, on April 6th, the plaintiffs served notice on the defendants that on the 20th of that month they would move the court to vacate the judgment, and restore the cause to the calendar for trial, upon the ground that there were no findings to support the judgment. In due time the motion was heard, and submitted upon the papers and record in the case, and upon an affidavit made by plaintiffs' attorney, in which, among other things, he stated: "No

stipulation was made that said statement should constitute a part of the judgment-roll in the action. Findings were not waived. No findings of fact have been signed or filed." On April 29th the court denied the motion, "for the reason that all the facts in the case had been agreed upon, and submitted to the court, and consequently that there was no issue of fact before the court to be determined, and nothing requiring, or upon which to base, separate findings of fact; the court being of the opinion that the findings of fact were, in effect, thereby waived, and no other or further findings of fact were necessary or permissible, beyond the said agreed statement." From this order denying their motion the plaintiffs appealed, and have brought the case here on a bill of exceptions.

The defendants move to dismiss the appeal, and in support of their motion cite, among other cases, Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175. In that case the appeal was from an order like that involved here, and on motion the appeal was dismissed. The court said: "The motion was not for a new trial, and the judgment was itself appealable. It is settled that, when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside: Citing cases. The plaintiff should have appealed from the judgment, with a bill of exceptions upon that appeal." Upon the authority of that case, we advise that the appeal in this case be dismissed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal herein is dismissed.

CONLON v. GARDNER et al.

No. 18,008; March 9, 1893.

32 Pac. 565.

Change of Venue—Review.—Where the Evidence on the Hearing of a motion for change of venue on the ground of change of residence is conflicting as to whether the residence had actually been changed when the action was commenced, the discretion of the trial court in denying the motion will not be reviewed on appeal.

APPEAL from Superior Court, Amador County; C. B. Armstrong, Judge.

Action by Thomas Conlon against Eli Gardner and Eleanor T. Gardner. From an order denying their motion for a change of venue, defendants appeal. Affirmed.

Eagon & Rust for appellants; Caminetti & McGee for respondent.

BELCHER, C.—The plaintiff commenced this action to recover from the defendants the sum of $3,000, alleged to be due him from them as commissions for the sale of certain mining property situate in the county of Amador. The complaint was filed in the superior court of Amador county on September 5, 1891, and the summons was duly served on defendants in that county on the 15th of the same month. In due time defendants demurred to the complaint, filed an affidavit of merits, and an affidavit that they were at the time of the commencement of the action, and were then, and had been ever since the —— day of June, 1891, residents of and actually residing in the county of Alameda, and demanded that the place of trial of the action be changed to the county of Alameda. The plaintiff contested the application for a change of venue, and, when the motion came on to be heard, a large number of additional affidavits were filed and read on both sides. The court below denied the motion, and the defendants appeal from the order.

The plaintiff's affidavits were positive to the effect that defendants had resided in Amador county for a good many

years, and continued to reside there until September 25, 1891. The defendants' affidavits, on the other hand, were positive to the effect that defendants left Amador county and became permanent residents of Alameda county on July 18, 1891, and that they thereafter had only gone back to the former county two or three times on business. It was, however, admitted that their household furniture and some of their children remained in their old home until September 25th. The question, then, presented for decision by the trial court was one of fact, viz., Where did defendants actually reside on September 5th, the date of the commencement of the action? The evidence upon this question was clearly and squarely conflicting, and it has been held that in such a case an order like that appealed from here will not be disturbed on appeal: Creditors v. Welch, 55 Cal. 469; Hastings v. Keller, 69 Cal. 606, 11 Pac. 218. And if, as said in Tuller v. Arnold, 93 Cal. 168, 28 Pac. 863, this rule does not apply where the evidence is all documentary, still "this court will not interfere with the discretion of the trial court, except where it can plainly see that there has been an abuse of such discretion." Here we do not think it can be said that the court plainly abused its discretion in denying the defendants' motion.

The order should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

AUBURN OPERA HOUSE AND PAVILION ASSOCIATION v. HILL.

No. 18,097; March 9, 1893.

32 Pac. 587.

Corporate Stock—Liability on Subscriptions.—In an Action by an opera-house company to recover a subscription to its capital stock, it appears that a "prospectus" recited in detail the objects of the intended corporation, the amount of stock, etc., and that the sub-

scriptions were to be called in on installments; that defendant signed the prospectus for a certain number of shares; that four calls had been ordered by the board of directors, and payment demanded; and that defendant had failed to pay. Held, that plaintiff was entitled to recover.[1]

Corporate Stock—Liability on Subscriptions.—Such Prospectus stated that the building was "to be built by a corporation with a capital stock of $20,000, consisting of one thousand shares at twenty dollars per share." Held, that it was not a condition precedent to defendant's liability that $20,000 of plaintiff's stock should be first subscribed for.[2]

Corporate Stock—Liability on Subscriptions.—It Appeared That Defendant was one of plaintiff's directors for two months, during which time he signed the articles of incorporation, was present at meetings of the board when the calls for the first two installments were ordered, and voted in favor of accepting the building lot, and that he served as a member of the building committee, prepared several plans for building, and consulted various architects and contractors about the same. Held, that, though the subscription for the full amount of stock mentioned in such contract was a condition precedent to defendant's liability, he had waived any objection on the ground that such amount was not subscribed.[3]

APPEAL from Superior Court, Placer County; W. H. Grant, Judge.

Action by the Auburn Opera House and Pavilion Association against George M. Hill on a contract of subscription to stock in such corporation. From a judgment for defendant, plaintiff appeals. Reversed.

The complaint set out the prospectus in full, which constitutes the alleged contract signed by defendant, as follows: "Object: To build an opera house and pavilion, combined, in Auburn, Placer county, California. To be built by a corporation with a capital stock of $20,000, consisting of one thousand shares at twenty dollars per share. The property to be owned by the shareholders, and controlled and managed

[1] **Cited** in Auburn etc. Assn. v. Hill, 113 Cal. 383, 45 Pac. 696, as part of the history of the case which was being decided on its second appeal, in effect affirming the other.

[2] **Cited** in the note in 93 Am. St. Rep. 349, on the liability to corporations of subscribers to their stock.

[3] **Cited** in the note in 93 Am. St. Rep. 380, 383, on the liability to corporations of subscribers to their capital stock.

by a board of trustees. The building to be used for opera-house purposes, balls, large assemblies, reunions, and conventions, and with the pavilion annex for district fair exhibits, circus exhibits, celebrations and drill-hall. The revenues to pay dividends on stock will be derived from rentals of store-rooms below and offices above on street front, and theatricals, balls, fairs, etc., etc., from rear portions of building. The location of the building, and the selection of the trustees, to be determined by the subscribers of the majority of the stock. As the district fair is again approaching, the above suggestions, if carried out, will solve the vexed question of a permanent exhibit hall for our district fair, besides furnishing a much-needed public building for Auburn. The subscriptions to be called in on installments, as needed to purchase a site, and erect and furnish the building." The names of subscribers, with the number of shares and the amount subscribed, follow. It was also stated in the complaint that, when stock to the amount of $17,660 was subscribed, it was agreed among all the subscribers—defendant being one—that such sum was sufficient for the purpose intended, and waived the procuring of subscriptions to the full amount; that defendant was actively promoting said corporation; that the subscribers selected five trustees, among whom was defendant; that they purchased ground selected by such shareholders, and paid the money therefor, and also for the building erected thereon; and that plaintiff, by its board of directors, made calls and demands for installments on the several subscribers as follows: One-fourth of each subscription, May 2, 1890; one-fourth, July 6, 1890; one-fourth, August 26, 1890; and one-fourth, October 2, 1890—at which times such calls and demands were made on defendant, but he failed and refused to pay the same, or any part thereof. It appeared that defendant was elected a director May 2, 1890, and remained such until July 6, 1890, when his resignation was accepted; that while a director he signed and acknowledged the articles of incorporation, served as a member of the building committee, prepared several drafts and plans for building, and consulted various architects and contractors about such building; and that as such director he was present at the meeting when the first call for an installment was ordered, and voted in favor of accepting the

building lot which had been previously reported; also that the second call, made while defendant was still a director, was ordered by a unanimous vote. It was contended by defendant that the prospectus was too indefinite and uncertain to constitute a contract; that, if it did constitute a contract, it required that stock should be subscribed for to the amount of $20,000 before it became binding on any of the subscribers; and that defendant had not waived such condition.

J. O. Hamilton and G. W. Hamilton for appellant; Johnson, Johnson & Johnson and John M. Fulweiler for respondent.

PER CURIAM.—1. Under defendant's contract of subscription for the stocks of plaintiff, as contained in the prospectus signed by defendant, and upon the facts alleged in the complaint as to plaintiff's calls or demands for the amount agreed to be paid for such subscribed stock, the plaintiff is entitled to maintain this action: Marysville Electric Light Co. v. Johnson, 93 Cal. 546, 27 Am. St. Rep. 215, 29 Pac. 126; California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859.

2. It was not a condition precedent to defendant's liability that $20,000 of plaintiff's stock should be first subscribed for; but, were it otherwise, the defendant has waived the objection which he now makes upon this ground: Hotel Co. v. Callender, supra. Indeed, the acts of defendant constituting such waiver are stronger than those held to have that effect in the case cited. Judgment and order reversed.

WOLTERS v. THOMAS.

No. 18,007; March 10, 1893.

32 Pac. 565.

Novation.—S., Being Indebted to Plaintiff, Gave Him a written order on defendant, who was indebted to S.; and plaintiff presented the order to defendant's foreman, who accepted it. Defendant afterward denied the foreman's authority to accept it, but, on being shown it, and told the circumstances, agreed to pay plaintiff whatever should be due S. from him. Held to constitute a novation.[1]

Limitation of Actions—Pleading.—Under Code of Civil Procedure, section 458, providing that, "in pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated, generally, that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon)," a plea of the statute of limitations, alleging that a cause of action is barred by Code of Civil Procedure, section 339, is insufficient, since such statute contains several subdivisions.

Limitation of Actions—Pleading.—The Objection to the Answer need not be taken by special demurrer for uncertainty.

APPEAL from Superior Court, Placer County; G. G. Clough, Judge.

Action by J. C. Wolters against J. H. Thomas to recover a claim against defendant, alleged to have been assigned to him. From a judgment for plaintiff, defendant appeals. Affirmed.

Goodwin & Goodwin for appellant; C. E. McLaughlin for respondent.

TEMPLE, C.—This appeal is from a judgment, and was taken within sixty days after its rendition. The question

[1] **Cited** and approved in Bank of Yolo v. Bank of Woodland, 3 Cal. App. 567, 86 Pac. 822, and the principle applied to the giving of an order requesting a person to pay to the defendant bank any balance on settlement that might be due the drawer. This order, though not negotiable, constituted, it was held, a valid novation, as provided in Civil Code, sections 1530–1532.

presented is whether the trial court erred in overruling defendant's motion for nonsuit. It does not appear that any further evidence was introduced after the motion was made. The complaint shows, by proper averment, that on the nineteenth day of July, 1887, the defendant was indebted to Sing Lee Co in the sum of $432.37, and that Sing Lee Co was indebted to plaintiff in the same amount; that plaintiff agreed with Sing Lee Co to release him from such indebtedness if he would give an order upon defendant for that amount, provided defendant would accept such order; that thereupon Sing Lee Co gave him an order upon defendant, in writing, whereby he requested defendant to pay the amount to plaintiff; that the order was presented to defendant's foreman, who accepted the same in writing, and thereupon plaintiff gave Sing Lee Co credit for that sum on his books; that shortly afterward plaintiff met defendant, and showed him the order, and explained to him all the facts; that defendant said that his foreman had no authority to accept the order, but that it was all right, for whatever sum he owed Sing Lee Co; that subsequently, upon a settlement between defendant and Sing Lee Co, it was found that defendant was indebted to Sing Lee Co in the full amount of the order, and that sum was charged up against Sing Lee Co on account of the order, and is retained by defendant, who has never paid any part of it to Sing Lee Co or to plaintiff, though plaintiff has often demanded the same. The complaint contains many other averments not essential to the determination of this appeal. On the trial the evidence failed to show that the foreman had any authority to accept the order for defendant, and did show that the amount of defendant's indebtedness to Sing Lee Co was only $371.25, instead of $432.37 as alleged. In other respects, the allegations of the complaint were substantially proven, so far as set out above. It also appeared that, before receiving the order from Sing Lee Co, plaintiff called upon defendant's foreman to ascertain the amount due Sing Lee Co, and was informed that the sum was $432.37, and therefore the order was drawn for that sum. The intent was to include whatever was due from defendant to Sing Lee Co. Two points are made by the appellant: The first is that the cause of action alleged is upon a written order, and the evidence does not sustain the allegation. The cause

of action proved, if any, is upon an assignment of an open account. The second, that the action is barred by the statute of limitations.

1. While the complaint sets out a written order, and avers that it was duly accepted by the defendant, it also shows that defendant was at the time indebted to Sing Lee Co, and, upon being shown the order, and told the circumstances, agreed to pay plaintiff whatever should be found due Sing Lee Co. I think a cause of action is stated, aside from the alleged acceptance. The facts would certainly show a contract of novation, if not a cause of action upon the order: See Joyce v. Wing Yet Lung, 87 Cal. 424, 25 Pac. 545.

2. The plea of the statute of limitations is in the following words: "And, as further defense to said action, alleges that the same is barred by the provisions of section 339, Code of Civil Procedure of the state of California." That section reads as follows: "Within two years: (1) An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state. (2) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape. (3) An action to recover damages for the death of one, caused by the wrongful act or neglect of another." Section 458, Code of Civil Procedure, provides: "In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated, generally, that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon)," etc. It is manifest that the answer does not comply with this section. Counsel say that the answer is equivalent to saying that the cause of action is barred by each of the subdivisions contained in the section referred to. But, if this is the effect, it clearly is not a compliance with the statute. Tested by ordinary rules of pleading, the absurdity of this claim is very obvious. It would be an averment, not only in the same defense, but in the same sentence, that the cause of action is founded upon a contract not in

writing, upon a liability incurred by an officer, and that it is an action to recover damages for the death of one, caused by the wrongful act of another. The substituted mode of pleading was allowed to avoid useless prolixity, but was so conditioned as to secure all necessary definiteness in pleading. The rule contended for would nullify these conditions.

Counsel further contend that the objection should have been made by special demurrer, on the ground of uncertainty or ambiguity. But the objection is not that there is uncertainty in the statement of facts, but that no facts are stated. It is only by a compliance with the statute that such a defense can be made without stating facts. That there must be a strict compliance in such cases has often been held: Manning v. Dallas, 73 Cal. 421, 15 Pac. 34; Young v. Wright, 52 Cal. 407; Judah v. Fredericks, 57 Cal. 389.

Counsel say that there are numerous cases in which such pleas have passed here without challenge. The only case cited is Lattin v. Gillette, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545. That case discloses no such plea, nor does it contain any language to justify such assertion. An examination of the record in that case shows that the section and subdivision thereof were pleaded. I think the judgment should be affirmed.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

LYONS v. KNOWLES et al.

No. 18,010; April 11, 1893.

32 Pac. 883.

Employer's Liability—Defective Appliances—Evidence.—In an action by a servant against the master for injuries caused by the breaking of the hook of the upper block on a derrick used in moving stone, there was evidence that the hook, which was of wrought iron, broke because of crystallization. The derrick, block, and hook had been in use but a few months. Defendant's expert testified that, if the iron had been flawless, the hook could have been safely used for

about five years in lifting from seven to ten tons, while plaintiff's expert testified that if the hook was new it would support six tons, which was the weight of the stone being raised when the hook broke. Held, that the evidence was insufficient to charge defendant with negligence.

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by Charles C. Lyons against F. E. Knowles and others for personal injuries. From a judgment for plaintiff, defendants appeal. Reversed.

James G. Maguire, A. A. Moore and J. C. Martin for appellants; Thompson & King and Church & Cory for respondent.

TEMPLE, C.—This action was brought to recover damages for a personal injury, alleged to have been caused through the negligence of defendants. It is alleged that defendants, as partners, were engaged in quarrying rock and transporting the same by railroad, and employed one Dusy to haul the rock from the quarry to the railroad station, and there load the same on the cars; that by the terms of their contract with Dusy they agreed to furnish all necessary and proper machinery and appliances for the purpose of loading and unloading the rock, and to furnish assistance in loading the rock from the ground onto the cars; that in October, 1888, while Dusy was engaged in hauling and loading granite blocks under the contract, defendants, regardless of their duty, and the lives and safety of plaintiff and others employed in loading and unloading the same, carelessly and negligently caused to be attached to a derrick a block and tackle for the purposes of loading and unloading said granite, which block and tackle was used during all of the times mentioned in the complaint; that said block and tackle, and particularly the hook of the upper block, was imperfectly constructed, defective, weak and unsafe, and wholly inadequate in strength to support the weight of a particular block mentioned in the complaint, and that defendants knew of the imperfection and unsafeness; that on the 1st of December, 1888, plaintiff was employed and hired by Dusy to load and unload said granite, and was then and there, with the assistance of defendants and em-

ployees, engaged in loading from the ground onto a car a certain block of granite, and that, while so engaged, the hook alluded to, by reason of its imperfection and inadequacy, broke and gave way, without fault of plaintiff, causing the rock to fall, crushing his foot so that amputation became necessary. After a demurrer had been overruled, defendants answered, denying that they were partners, and in effect all the allegations of the complaint. The case was tried by a jury, which returned a verdict for plaintiff. A motion for a new trial was made by defendants, one of the grounds of which was that the evidence was insufficient to support the decision. The motion having been denied, the defendants appeal from the judgment and from the order denying them a new trial.

On the trial plaintiff testified that he was employed by Dusy, but did not know the contract between Dusy and defendants; that Dusy was engaged in hauling granite from the quarry to the switch, and in loading it upon the cars; that defendants had erected at the switch a derrick, to be used in loading the granite upon the cars. Plaintiff was employed by Dusy to attend to the loading at the switch. When the cars were ready to receive the granite as it came down on the wagons, Mr. Dusy's teamsters and plaintiff loaded it from the wagons to the cars. If no cars were there when hauled, the rock was unloaded on the ground, and, when the cars came, defendants always sent men to assist him. Defendants or their clerk would designate what rock should go upon certain cars, but otherwise exercised no supervision or control of the matter of loading. Appellants urge many reasons for a reversal of the judgment, among them that the evidence shows that defendants were guilty of no negligence.

Plaintiff's account of the accident was as follows: "I was engaged in loading a large block of granite, weighing about six tons, from the ground to a flat car. Louis Knowles, the bookkeeper of defendants, his son, and Mr. Johnson, all of whom were in the employment of F. E. Knowles & Co., were helping me. We had hoisted the block of granite from the ground, and swung it around over the flat car. I think I gave all the orders that were given on that occasion. When the granite block had been hoisted to a sufficient height to swing clear of the car, I put on the brake on the winch with which we did the hoisting, and gave the lever of the brake to Mr.

Louis Knowles, and told him to hold it. I then took hold of a rope attached to the granite block, and swung it around over the car and fixed it in the position in which it should rest upon the car. . . . . I was holding the block of granite in position. I reached over with my right hand to get a timber to place under the end of the block of granite when lowered to the car. I had my left hand still on the block of granite, steadying it. Just as I leaned over to get hold of the timber, the hook of the upper block attached to the end of the boom, and from which the granite block was suspended, broke, and the granite block fell on my foot." He also testified that he thought the derrick was improperly rigged, because the block with three sheaves was at the bottom, and the block with two sheaves was at the top. It ought to have been reversed. Also, that the derrick had been erected by Dusy, at the quarry in May or June, 1888, and that witness had been employed by Dusy for several months prior to August of that year, and while so employed he worked with the same derrick. He also testified, on cross-examination, that he did not know the exact weight of the rock, but thought it was between five and six tons; that they had previously loaded several blocks of the same size with the one which fell on his foot with the same derrick, and the same block and tackle, and the same hook that broke. Another witness said that the derrick was improperly rigged, because the three sheaves ought to have been at the top instead of at the bottom. The weight would have been more evenly distributed, and a jolt or jar would not have caused so great a strain. He said: "Sometimes in hoisting rock the second row of coils of the rope on the drum of the winch will slip through the first row, causing a jar, and straining the derrick." There was no jar during the raising of the rock which fell and injured plaintiff.

It appeared that the hook was composed of common wrought iron, an inch and a quarter thick, and the evidence tended to show that the break was caused by the crystallization of the iron—a defect which no one could have discovered by examining the iron. A witness was examined for plaintiff as an expert who said that he was a machinist, but did not know the breaking weight of common black iron. He was allowed to testify, however, without objection on that ground, and said he thought the hook, when new, would not sustain more than

six tons as a breaking weight; didn't think it would be safe in hoisting a ton when it broke, but thought the breaking weight of such a hook would be about six tons, and its working weight about four tons. He thought from appearances that the block and tackle were old. Defendants proved by Dusy, whose testimony was uncontradicted, that the derrick and block and tackle were procured new in March of that year, and had therefore been used only a few months before the accident; and by Sheppard, a civil engineer, who claimed to be familiar with the tensile strength of iron and steel, that the lowest tensile strength of an inch bar of common black iron was twenty-two tons; and he said that in thirty experiments conducted by scientific men the lowest breaking weight found was twenty-two tons. The hook which broke here was one inch and a quarter, and should sustain a weight in excess of twenty-two tons, by at least twenty-five per cent. He thought if the iron had been free from flaw it could safely have been used for from four to five years in lifting from seven to ten tons. The hook had not been used one year. Berchig, plaintiff's expert witness, thought it must have been old, but said, if new, it would support six tons. But, to charge defendants with negligence in allowing the hook to be used, it must not only appear that it was in fact insufficient, but that defendants knew of its defectiveness, or by the use of ordinary diligence and care could have known it. It was shown that the iron was apparently sound, and that its defect could not have been discovered by an examination. It was apparently sufficient for the purpose for which it was used. It had been frequently used in lifting blocks of the same size. Although it proved to be in fact insufficient, its continued use under such circumstances is not proof of negligence: Sappenfield v. Railroad Co., 91 Cal. 57, 27 Pac. 590.

As to the rigging of the derrick, plaintiff's means of knowledge of the defect, if any, was at least equal to defendants'. It appears as a fact that he did not know of it, and, as there was no jolt or jar at the time of the accident, it is difficult to see how it could have contributed to the accident. The injury, therefore, must be attributed to accident for which no one can be held responsible. An employer does not guarantee the sufficiency of appliances furnished, but only for the exercise of such skill and diligence in providing safe ma-

chinery as discreet and prudent men would use where the risk is their own. I do not think negligence on the part of defendants could reasonably be inferred from the evidence. Taking this view of the case, it is not necessary to consider the other points raised. For the purpose of this decision it is assumed, but not decided, that defendants would have been responsible had it been shown that there was negligence in the use of the derrick. I think the judgment and order should be reversed, and a new trial had.

We concur: Vanclief, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

PEOPLE v. SHERMAN.

No. 20,922; April 11, 1893.

32 Pac. 879.

Information—Indorsing Names of Witnesses.—The names of witnesses examined before the committing magistrate need not be inserted at the foot of or indorsed on the information filed in court against defendant after he had been examined before such magistrate, though Penal Code, section 943, provides that when an indictment is found the names of the witnesses before the grand jury must be so indorsed.[1]

Larceny.—Where There is Evidence Before the Convicting Magistrate that a watch was taken from one B. when he was asleep, and when defendant and one F. were present, and it was afterward found concealed on the person of F., so as to indicate that it must have been taken feloniously, a finding by the trial court that defendant had been legally committed by the magistrate will not be disturbed on appeal.

Larceny.—The Stealing of a Watch from the Person of another is grand larceny, though the value of the watch is less than $50.

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[1] **Cited** and followed in People v. Neary, 104 Cal. 377, 37 Pac. 943, the court saying: "There is no requirement that the names of witnesses shall be indorsed upon an information, section 943 of the Penal Code applying only to indictments."

Witness.—Testimony to Show Improper Relations between the state's witnesses, a man and woman, in order to impeach the woman's testimony, is inadmissible.

Instructions.—The Court has a Right to Amend Imperfect instructions submitted.

APPEAL from Superior Court, Placer County; J. E. Prewett, Judge.

Al. Sherman was convicted of grand larceny and appeals. Affirmed.

L. L. Chamberlain for appellant; Attorney General Hart for the people.

BELCHER, C.—The defendant and one Lulu Franks were examined before a magistrate, and held to answer upon a complaint charging them with the crime of larceny, committed in the county of Placer, on or about the seventh day of June, 1891, by "willfully, unlawfully, feloniously, and maliciously stealing, taking, and carrying away one watch of the value of $75, the property of one S. T. Bowers." Thereafter the district attorney filed in the superior court of the county an information charging that the defendant, on or about the seventh day of June, 1891, in the county of Placer, "did then and there feloniously steal, take, and carry away from the person of S. T. Bowers one gold watch, of the value of seventy-five dollars," etc. When the defendant was called upon to plead to the information, he moved the court to set it aside upon the grounds: "(1) That the names of the witnesses examined before the committing magistrate are not inserted in or at the foot of said information, or indorsed thereon. (2) That before the filing of said information the said defendant had not been legally committed by a committing magistrate, in this: that after hearing the proofs it did not appear that a public offense had been committed, and there was not sufficient cause to believe the defendant guilty thereof." The court denied the motion, and the defendant, reserving an exception to the ruling, then pleaded not guilty to the charge. Subsequently the defendant was tried and found guilty of grand larceny, and judgment was entered that he be imprisoned in the state prison at Folsom for the

term of six years and three months. From this judgment, and an order denying his motion for a new trial, defendant appeals.

The first point made for a reversal of the judgment is that the court erred in refusing to set aside the information upon both of the grounds stated in the motion. Section 943 of the Penal Code provides: "When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court." And section 995 of the same code provides that an indictment must be set aside, on motion, upon several grounds, and, among others, when the names of the witnesses are not inserted or indorsed as required. There are, however, no provisions requiring the names of witnesses to be inserted at the foot of or indorsed upon an information, and the only grounds stated on which an information must be set aside are: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate; (2) that it was not subscribed by the district attorney of the county": See sections of code above cited. It is clear, therefore, that the court rightfully refused to set aside the information upon the first ground stated.

As to the second ground, it is earnestly urged that defendant had not been legally committed by a magistrate, because there was no evidence before the magistrate showing that he was guilty of the offense charged. But there was evidence showing that the watch had been taken from the person of Bowers when he was asleep, and when defendant and Lulu Franks were both present; and besides, it was afterward found concealed upon the person of Lulu Franks, in such a way as to clearly indicate that it must have been taken feloniously. We do not think, therefore, that it can be said there was no evidence tending to show the defendant's guilt, and, this being so, the ruling of the court below cannot be disturbed on appeal.

It is next claimed that the evidence was insufficient to justify the verdict, and that at most defendant should have been convicted of petit larceny only. This claim is rested upon the fact that the principal evidence that defendant took the watch from the person of Bowers was that of Lulu Franks,

an accomplice, and that the value of the watch was proved to be only "about $45." But the testimony of the accomplice was amply corroborated by other evidence, and, if the watch was taken from the person of Bowers, the offense was grand larceny, whether its value was greater or less than $50: Pen. Code, sec. 487. There is no merit, therefore, in this point.

When the prosecution rested, the defendant called as a witness Esther Brown, who testified that she had been in the county jail, and that "Miss Frank's room and mine were right alongside." She was then asked, "Did you see anyone, or did you see Mr. Brisentine, enter this woman's room?" The question was objected to by the district attorney as irrelevant and immaterial, and the objection sustained. This ruling is now assigned as error, and it is said by counsel that "Brisentine was a witness for the prosecution, as was also Lulu Franks, and it was proper for the defense to show the character of Lulu Franks, and her deportment while in jail, together with the relation existing between her and Brisentine." If, as would seem from the language above quoted, the purpose was to show improper relations between Brisentine and Lulu Franks, and thus to impeach her testimony, the question was clearly irrelevant and immaterial, as that is not the way prescribed for impeaching a witness: Code Civ. Proc., secs. 2051, 2052. We see no error in the ruling.

Finally, it is claimed that the court erred in modifying, and giving to the jury as modified, certain instructions asked by defendant, and in refusing to give certain others asked by him, and also in giving certain instructions of its own motion. The learned attorney, however, simply quotes the instructions, and says the action of the court in regard to them was erroneous. The defendant requested the court to give to the jury thirty-two separate instructions, and it gave twenty-two of them as requested, amended two, and gave them as amended, and refused to give eight. It also gave four instructions of its own motion. The instructions, as amended, stated the law correctly. The court had a right, therefore, to make the amendments, and its action cannot be complained of: People v. Dodge, 30 Cal. 448; People v. Hall, 94 Cal. 595, 30 Pac. 7. The instructions not given were properly refused, because some of them had already been substantially given, and the others did not correctly state the law of the case. There was, therefore, no error in the refusal. The in-

structions given by the court of its own motion were general statements of the law, and such as have been given in criminal cases and approved by this court many times. The instructions, as a whole, covered the case, and seem to have been full and correct. We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

BENICIA AGRICULTURAL WORKS v. ESTES et al.

No. 18,006; April 17, 1893.

32 Pac. 938.

Mortgage Foreclosure—Defense of Unlawful Consideration.—On a mortgage foreclosure the evidence showed that, at the time the note and mortgage were given, there was pending, in insolvency proceedings against defendants' father, the latter's petition for discharge and plaintiff's opposition thereto; that the consideration of the note, though not expressed therein, was an assignment to defendants by plaintiff of his claim against the insolvent, which was of the same amount as the note, and that the estimated value of the claim was one-sixth of its face; that by agreement plaintiff's claim against the insolvent assigned to defendant was to be held by plaintiff's attorney, and, when paid, to be applied on the note; that, after the giving of the note and mortgage, plaintiff's opposition to the discharge of the insolvent was withdrawn. Held, that the mortgage and note were void as against public policy.

Mortgage Foreclosure—Evidence of Unlawful Consideration.—The fact that a mortgage was given as security for the performance of an unlawful contract may be shown by oral testimony in an action for foreclosure, though no infirmity appears on the face of the mortgage.[1]

APPEAL from Superior Court, Fresno County; M. K. Harris, Judge.

Action by the Benicia Agricultural Works, a corporation, against Lyman W. Estes and M. Estes, for the foreclosure

[1] **Approved** in Daw v. Niles, 104 Cal. 118, 37 Pac. 881, where oral evidence was admitted to prove a promise by a mortgagor, made contemporaneously with the mortgage, to pay the mortgage tax.

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be only "about $45." But the testimony c...
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"Brisentine was a wit... fense are substantially as follows:
Lulu Franks, and it ... execution of the note and mortgage,
character of Lulu F... he superior court a proceeding, under
together with the ... 1880, against one Albert Estes, the father
tine." If, as w... instituted by his creditors, in which he had
the purpose wa... an involuntary insolvent, and had filed his
tine and Lulu ... final discharge from all his debts and liabilities;
the question ... ntiff, as one of the creditors of the insolvent whose
is not the ... een proved, opposed the final discharge of the in-
Civ. Proc... and had filed in the court in which the proceeding was

Final'... written specifications of the grounds of its opposition;
and gi... petition of the insolvent for discharge, and the op-
by d... thereto by the plaintiff, were pending and undecided
him... the time of the making and execution of the note and
Th... mortgage; and that the only consideration for the making of
s... said note, and the execution of said mortgage, was the with-
drawal by plaintiff of its opposition to the final discharge of
the insolvent. The cause was tried by the court, and the only
findings upon the issues tendered by the answer are, in sub-
stance, that the plaintiff did not promise the defendants that,
if they would make and execute the note and mortgage, the
plaintiff would withdraw all opposition to the discharge of
said insolvent; and that defendants did not make and execute
the note and mortgage in consideration of any agreement or
promise of the plaintiff to withdraw its opposition to the dis-
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tions of the answer in respect to the roceedings against Albert Estes, ge of the insolvent, were ad- oral testimony at the trial n their own behalf, and that had been the attorney for the its opposition to the discharge of the the plaintiff. Besides this, there was evidence, which will be noticed hereafter. at dispute that the trial of the matter of the he discharge of the insolvent had been set for twenty-second day of March, 1890, and that one fendants had been subpoenaed as a witness on that that during the morning of that day, before the hour ointed for the trial, the defendants called upon Mr. raham, when negotiations were commenced between him and them for a compromise or settlement of the matter of the opposition to their father's discharge. The defendants testified, in substance, that Mr. Graham, on behalf of plaintiff, first proposed the compromise, and offered to withdraw plaintiff's opposition to their father's discharge if they would pay, or secure the payment of, $1,200; that they said they had no money, but would accept the proposal if they could give satisfactory security, but they wanted a few days to consider the matter. Thereupon it was agreed that Mr. Graham should have the trial postponed until March 29th, to give time to complete the settlement, which he did. On March 24th the defendants returned, and on that day a compromise was effected, according to the terms of which they signed the note and mortgage in suit, and placed them in Mr. Graham's hands, with the understanding that they should be considered delivered, and take effect, when he should withdraw the plaintiff's opposition to their father's discharge, provided no other creditor should have filed opposition to such discharge; but if plaintiff's opposition should not be withdrawn, or if any other creditor should file opposition before the discharge, the note and mortgage were to be returned to defendants. That it was also agreed that defendants should be credited on their note the amount of dividends which should be paid by the

of a mortgage. Plaintiff had judgment, from which, and an order denying a new trial, defendants appeal. Reversed.

R. P. Davidson for appellants; R. B. Terry and G. B. Graham for respondent.

VANCLIEF, C.—Action to foreclose a mortgage executed by Lyman W. Estes to the plaintiff, to secure a joint and several promissory note for $1,200 made by both defendants. The only defense to the action is that the consideration for the note and mortgage was unlawful, as being contrary to the policy of express law. Judgment was rendered in favor of the plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial.

The facts of the alleged defense are substantially as follows: That, at the time of the execution of the note and mortgage, there was pending in the superior court a proceeding, under the insolvent act of 1880, against one Albert Estes, the father of the defendants, instituted by his creditors, in which he had been adjudged an involuntary insolvent, and had filed his petition for a final discharge from all his debts and liabilities; that the plaintiff, as one of the creditors of the insolvent whose claim had been proved, opposed the final discharge of the insolvent, and had filed in the court in which the proceeding was pending written specifications of the grounds of its opposition; that said petition of the insolvent for discharge, and the opposition thereto by the plaintiff, were pending and undecided at the time of the making and execution of the note and mortgage; and that the only consideration for the making of said note, and the execution of said mortgage, was the withdrawal by plaintiff of its opposition to the final discharge of the insolvent. The cause was tried by the court, and the only findings upon the issues tendered by the answer are, in substance, that the plaintiff did not promise the defendants that, if they would make and execute the note and mortgage, the plaintiff would withdraw all opposition to the discharge of said insolvent; and that defendants did not make and execute the note and mortgage in consideration of any agreement or promise of the plaintiff to withdraw its opposition to the discharge of said insolvent. The appellants contend that these findings are not justified by the evidence; and this is the only

ground upon which a reversal of the judgment and order is asked.

On the trial, the allegations of the answer in respect to the pending of the insolvency proceedings against Albert Estes, and the opposition to the discharge of the insolvent, were admitted by the plaintiff. The only oral testimony at the trial was that of the defendants on their own behalf, and that of G. B. Graham, Esq., who had been the attorney for the plaintiff in the matter of its opposition to the discharge of the insolvent, on behalf of the plaintiff. Besides this, there was some documentary evidence, which will be noticed hereafter. It appears without dispute that the trial of the matter of the opposition to the discharge of the insolvent had been set for trial on the twenty-second day of March, 1890, and that one of the defendants had been subpoenaed as a witness on that trial; that during the morning of that day, before the hour appointed for the trial, the defendants called upon Mr. Graham, when negotiations were commenced between him and them for a compromise or settlement of the matter of the opposition to their father's discharge. The defendants testified, in substance, that Mr. Graham, on behalf of plaintiff, first proposed the compromise, and offered to withdraw plaintiff's opposition to their father's discharge if they would pay, or secure the payment of, $1,200; that they said they had no money, but would accept the proposal if they could give satisfactory security, but they wanted a few days to consider the matter. Thereupon it was agreed that Mr. Graham should have the trial postponed until March 29th, to give time to complete the settlement, which he did. On March 24th the defendants returned, and on that day a compromise was effected, according to the terms of which they signed the note and mortgage in suit, and placed them in Mr. Graham's hands, with the understanding that they should be considered delivered, and take effect, when he should withdraw the plaintiff's opposition to their father's discharge, provided no other creditor should have filed opposition to such discharge; but if plaintiff's opposition should not be withdrawn, or if any other creditor should file opposition before the discharge, the note and mortgage were to be returned to defendants. That it was also agreed that defendants should be credited on their note the amount of dividends which should be paid by the

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The facts of the alleged defense are substantially as follows: That, at the time of the execution of the note and mortgage, there was pending in the superior court a proceeding, under the insolvent act of 1880, against one Albert Estes, the father of the defendants, instituted by his creditors, in which he had been adjudged an involuntary insolvent, and had filed his petition for a final discharge from all his debts and liabilities; that the plaintiff, as one of the creditors of the insolvent whose claim had been proved, opposed the final discharge of the insolvent, and had filed in the court in which the proceeding was pending written specifications of the grounds of its opposition; that said petition of the insolvent for discharge, and the opposition thereto by the plaintiff, were pending and undecided at the time of the making and execution of the note and mortgage; and that the only consideration for the making of said note, and the execution of said mortgage, was the withdrawal by plaintiff of its opposition to the final discharge of the insolvent. The cause was tried by the court, and the only findings upon the issues tendered by the answer are, in substance, that the plaintiff did not promise the defendants that, if they would make and execute the note and mortgage, the plaintiff would withdraw all opposition to the discharge of said insolvent; and that defendants did not make and execute the note and mortgage in consideration of any agreement or promise of the plaintiff to withdraw its opposition to the discharge of said insolvent. The appellants contend that these findings are not justified by the evidence; and this is the only

ground upon which a reversal of the judgment and order is asked.

On the trial, the allegations of the answer in respect to the pending of the insolvency proceedings against Albert Estes, and the opposition to the discharge of the insolvent, were admitted by the plaintiff. The only oral testimony at the trial was that of the defendants on their own behalf, and that of G. B. Graham, Esq., who had been the attorney for the plaintiff in the matter of its opposition to the discharge of the insolvent, on behalf of the plaintiff. Besides this, there was some documentary evidence, which will be noticed hereafter. It appears without dispute that the trial of the matter of the opposition to the discharge of the insolvent had been set for trial on the twenty-second day of March, 1890, and that one of the defendants had been subpoenaed as a witness on that trial; that during the morning of that day, before the hour appointed for the trial, the defendants called upon Mr. Graham, when negotiations were commenced between him and them for a compromise or settlement of the matter of the opposition to their father's discharge. The defendants testified, in substance, that Mr. Graham, on behalf of plaintiff, first proposed the compromise, and offered to withdraw plaintiff's opposition to their father's discharge if they would pay, or secure the payment of, $1,200; that they said they had no money, but would accept the proposal if they could give satisfactory security, but they wanted a few days to consider the matter. Thereupon it was agreed that Mr. Graham should have the trial postponed until March 29th, to give time to complete the settlement, which he did. On March 24th the defendants returned, and on that day a compromise was effected, according to the terms of which they signed the note and mortgage in suit, and placed them in Mr. Graham's hands, with the understanding that they should be considered delivered, and take effect, when he should withdraw the plaintiff's opposition to their father's discharge, provided no other creditor should have filed opposition to such discharge; but if plaintiff's opposition should not be withdrawn, or if any other creditor should file opposition before the discharge, the note and mortgage were to be returned to defendants. That it was also agreed that defendants should be credited on their note the amount of dividends which should be paid by the

of a mortgage. Plaintiff had judgment, from which, and an order denying a new trial, defendants appeal. Reversed.

R. P. Davidson for appellants; R. B. Terry and G. B. Graham for respondent.

VANCLIEF, C.—Action to foreclose a mortgage executed by Lyman W. Estes to the plaintiff, to secure a joint and several promissory note for $1,200 made by both defendants. The only defense to the action is that the consideration for the note and mortgage was unlawful, as being contrary to the policy of express law. Judgment was rendered in favor of the plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial.

The facts of the alleged defense are substantially as follows: That, at the time of the execution of the note and mortgage, there was pending in the superior court a proceeding, under the insolvent act of 1880, against one Albert Estes, the father of the defendants, instituted by his creditors, in which he had been adjudged an involuntary insolvent, and had filed his petition for a final discharge from all his debts and liabilities; that the plaintiff, as one of the creditors of the insolvent whose claim had been proved, opposed the final discharge of the insolvent, and had filed in the court in which the proceeding was pending written specifications of the grounds of its opposition; that said petition of the insolvent for discharge, and the opposition thereto by the plaintiff, were pending and undecided at the time of the making and execution of the note and mortgage; and that the only consideration for the making of said note, and the execution of said mortgage, was the withdrawal by plaintiff of its opposition to the final discharge of the insolvent. The cause was tried by the court, and the only findings upon the issues tendered by the answer are, in substance, that the plaintiff did not promise the defendants that, if they would make and execute the note and mortgage, the plaintiff would withdraw all opposition to the discharge of said insolvent; and that defendants did not make and execute the note and mortgage in consideration of any agreement or promise of the plaintiff to withdraw its opposition to the discharge of said insolvent. The appellants contend that these findings are not justified by the evidence; and this is the only

ground upon which a reversal of the judgment and order is asked.

On the trial, the allegations of the answer in respect to the pending of the insolvency proceedings against Albert Estes, and the opposition to the discharge of the insolvent, were admitted by the plaintiff. The only oral testimony at the trial was that of the defendants on their own behalf, and that of G. B. Graham, Esq., who had been the attorney for the plaintiff in the matter of its opposition to the discharge of the insolvent, on behalf of the plaintiff. Besides this, there was some documentary evidence, which will be noticed hereafter. It appears without dispute that the trial of the matter of the opposition to the discharge of the insolvent had been set for trial on the twenty-second day of March, 1890, and that one of the defendants had been subpoenaed as a witness on that trial; that during the morning of that day, before the hour appointed for the trial, the defendants called upon Mr. Graham, when negotiations were commenced between him and them for a compromise or settlement of the matter of the opposition to their father's discharge. The defendants testified, in substance, that Mr. Graham, on behalf of plaintiff, first proposed the compromise, and offered to withdraw plaintiff's opposition to their father's discharge if they would pay, or secure the payment of, $1,200; that they said they had no money, but would accept the proposal if they could give satisfactory security, but they wanted a few days to consider the matter. Thereupon it was agreed that Mr. Graham should have the trial postponed until March 29th, to give time to complete the settlement, which he did. On March 24th the defendants returned, and on that day a compromise was effected, according to the terms of which they signed the note and mortgage in suit, and placed them in Mr. Graham's hands, with the understanding that they should be considered delivered, and take effect, when he should withdraw the plaintiff's opposition to their father's discharge, provided no other creditor should have filed opposition to such discharge; but if plaintiff's opposition should not be withdrawn, or if any other creditor should file opposition before the discharge, the note and mortgage were to be returned to defendants. That it was also agreed that defendants should be credited on their note the amount of dividends which should be paid by the

assignee on the plaintiff's claim against the insolvent, which, it was then understood, would not exceed $200. Defendants further testified that there was no other consideration for the note and mortgage than above stated.

The minutes of the court in which the insolvency proceeding was pending show that on March 22d the trial of the matter of opposition to the discharge of the insolvent was postponed, at request of Mr. Graham, by stipulation with opposing counsel, until March 29th, and that on March 29th the opposition of plaintiff to the discharge of the insolvent was withdrawn by Mr. Graham as attorney for plaintiff, the minute of the withdrawal being as follows: "Insolvency of Albert Estes. Now comes G. B. Graham, attorney for Benicia Agricultural Works, and in open court withdraws his opposition to the discharge of the insolvent heretofore filed." Plaintiff's counsel objected and excepted to all oral testimony as to the transaction, on the ground that the only agreement made had been reduced to writing, and signed by defendants, and they contend here that the written instrument so signed is the only competent evidence of the transaction; and there is no question that the following instrument was drawn by Mr. Graham, and signed by the defendants:

"March 24, 1890.

"Whereas, L. W. Estes and M. Estes have this day given their notes to Benicia Agricultural Works for the sum of $1,200, payable in seven months from this date, and the said L. W. Estes executed a mortgage on certain real estate to secure said note, which said note was given to secure the amount by them agreed to be paid to the Benicia Agricultural Works for the transfer to them of a certain claim by the said Benicia Agricultural Works against the estate of Albert Estes, an insolvent, which proceedings in insolvency were begun and are pending in the superior court of Fresno county, state of California; and it is hereby agreed by the undersigned that said claim so transferred to them by the said Benicia Agricultural Works shall be held by Geo. B. Graham, its attorney, as collateral security to said note and mortgage, and he shall have the right to collect and receipt to the assignee of said insolvent estate for any dividends that may be payable on account of said claim, and credit the same on said note. Said mortgage is not to be recorded until March 29, 1890;

and, in case any creditor shall, of his own motion, file opposition to the discharge of said insolvent before or at that time, said note and mortgage to be surrendered back to them, and they to retransfer said claim.

"L. W. ESTES.
"M. ESTES."

This instrument was put in evidence by plaintiff, and is admitted to have been drawn by Mr. Graham, and signed by defendants, at the time the note and mortgage were signed.

Mr. Graham testified that this instrument, as written, is the agreement that was entered into, and contains all its terms; that he never agreed to withdraw plaintiff's opposition to the discharge of the insolvent, except at the request of defendants; that he told defendants the opposition to the discharge would be within their control. "They told me they wanted to dismiss it. Then I said, 'I will go up to court, and dismiss it on Saturday (March 29th) on your request'; and I did dismiss it for them, and not for anybody else. . . . . There was not a word said about my signing the agreement; never intended to sign it. . . . . I notified the Benicia Agricultural Works of the mortgage, and they ratified everything I did with it." He further testified that defendants first proposed the settlement or compromise, and that he immediately said to them: "You can't settle it or compromise anything with me. The only way you can do in the matter is to buy the claim. . . . . I don't think I told them it would be illegal to do so. I knew it myself, and just shut it all off by telling them they need not say anything except about the purchase of the claim. I told them if they purchased the claim they could dismiss the opposition—control it; the right to control it would pass to them. . . . . I told them I would do whatever they directed me to do; it would be under their control. Did not tell them I would have them substituted in the proceeding, and appear as their attorney. I did not have them substituted in the proceeding. I appeared as their attorney in the way I did. They told me to dismiss, and I did it. Did not make any intimation to the court of any change in the relationship. I simply dismissed it. I was in the case as attorney for the Benicia Agricultural Works." Being asked to explain the last part of the written agreement the witness said: "I think I can state that so you can understand it. They said they

didn't want to buy the claim if there was going to be other opposition filed, ... and this agreement was written up in accordance with what was then understood and agreed between us—that in case other opposition should be filed, that then I was to surrender it, and there was to be no sale; if there was no other opposition filed, then it was to be an absolute sale. Question. Then, unless the withdrawal of the opposition you had filed could be made effective, there was to be no sale. That was the understanding, was it? Answer. You can draw your own conclusions about that. I have stated to you what was said. They directed me to dismiss the opposition after I had turned it over to them. Q. Then you have no other explanation than that you have given of that last clause of the agreement? A. The clause explains itself. It is according to the terms of the agreement between us. There is no explanation to be given growing out of the contract or agreement between the parties. I have an opinion about it, but my opinion, the court has said, was not proper to be given. No, sir; I have no explanation to make." The testimony of the defendants that it was estimated and understood that the dividends to be paid by the assignee on plaintiff's claim against the insolvent would not exceed $200 was not disputed.

Conceding the truth of Mr. Graham's testimony as to facts, exclusive of his opinion as to their legal effect, and considering only such parts of the testimony of the defendants as are undisputed, it seems too clear to admit of debate that the entire substance of the consideration for the note and mortgage consisted of the withdrawal of plaintiff's opposition to the discharge of the insolvent, Albert Estes. Mr. Graham must have known that the defendants had in view, and sought to accomplish, only that object; and it is clearly apparent that they received, and were to receive, nothing else beneficial to themselves or detrimental to the plaintiff. It was not disputed that the parties understood that the dividends on plaintiff's claim against the insolvent would not exceed $200, nor is it pretended that such understanding was incorrect. Therefore, the formal assignment of that claim, on the condition that plaintiff should continue to hold it as collateral security, and receive and credit the dividends on the note, did not operate as a consideration, or even as a partial consideration,

for the note. The note and the conditional assignment of the claim, having been parts of the same transaction, are to be construed together, and in the light of the circumstances of the case; especially the circumstances that the parties understood that the dividends on plaintiff's claim against the insolvent would not exceed $200, and that the sole object of the defendants was to secure the discharge of their father. By so construing the note and written agreement, any attempted disguise is made transparent, the alleged transfer of plaintiff's claim against the insolvent is discovered to be mere form without substance—a mere subterfuge—and the real nature of the transaction is clearly revealed. The provision that the claim, said to have been assigned, was to be held and the dividends thereon collected by plaintiff and credited on the note, becomes merely a qualification or contingent limitation of the liability of defendants on their note, the only effect of which is that, instead of being unconditionally obligated to pay $1,200, as expressed in the note, the defendants are only bound to pay $1,200, less the amount of the dividends paid plaintiff on its claim against the insolvent. It is the same as if the contingent qualification or limitation had been expressed in the note.

If the views above expressed as to the effect of the evidence are correct, it follows that the consideration for the note and mortgage was illegal, because "contrary to the policy of express law," in the sense of the second subdivision of section 1667 of the Civil Code, and consequently the note and mortgage are void. The authorities to this effect are numerous, only a few of which, specifically applicable to this case, need be cited. The facts of the case of Bell v. Leggett, 7 N. Y. 176, are almost entirely similar to the facts of this case. The bankrupt proceedings in question in that case were under the United States bankrupt act of 1841, the policy of which in respect to withdrawing opposition to the discharge of the bankrupt cannot be distinguished from that of our insolvent act of 1880. Indeed, that case was cited by our code commissioners as an example falling under the second subdivision of section 1667 of the Civil Code: See note 2 under that section in Deering's Code. It is also cited as authority, on a point similar to the principal point in this case, in Estudillo v. Meyerstein, 72 Cal. 317, 13 Pac. 869. The case of Rice v.

Maxwell, 53 Am. Dec. 85, is also specifically applicable to this case. As having a general bearing upon the main question in this case the following cases may be consulted: Valentine v. Stewart, 15 Cal. 403; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391; Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36; Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735. The point made by counsel for respondent to the effect that the oral testimony was incompetent is not tenable: Buffendeau v. Brooks, 28 Cal. 642, and cases above cited. For the reason that the finding excepted to is not justified by the evidence, I think the order and judgment should be reversed, and a new trial granted.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order and judgment are reversed and a new trial granted.

KELLENBERGER et al. v. MARKET STREET CABLE RAILWAY COMPANY.

No. 15,020; May 3, 1893.

33 Pac. 90.

Appeal—Discretion of Trial Court.—Where the Evidence is Dubious and conflicting, the court on appeal will not, although it may differ in opinion with the lower court, revise the action of the court below in granting or refusing a new trial, unless an abuse of discretion is shown.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by Ida Kellenberger and husband against the Market Street Cable Railway Company to recover damages for personal injuries. From an order granting a new trial, defendant appeals. Affirmed.

E. L. Craig, Frank Shay and R. B. Carpenter for appellant; W. H. H. Hart, A. R. Cotton and J. C. McKee for respondents.

SEARLS, C.—This is an appeal from an order granting a new trial. The action was brought to recover damages for injuries alleged to have been received by Ida Kellenberger, wife of her coplaintiff, on the eighth day of April, 1890, while a passenger on the cable car of the defendant. Plaintiff was on a Hayes street car, the gripman of which, as he approached the crossing of the Sutter street cable road on Larkin street, should, it appears, have "let go," or released the cable, but was diverted from doing so by the perilous situation of a pedestrian on the track, and as a result did not let go until he went over the pulley, and then could not do so, and the grip struck the bumper in the Sutter street track, producing a concussion by which, as is alleged, plaintiff was thrown from her seat and against one of the seats on the opposite side of the car, and thereby injured.

Two issues only of importance are made by the pleadings: (1) Was defendant guilty of negligence? (2) Was plaintiff injured thereby? Manifestly, both of these issues needed to be answered in the affirmative, to entitle plaintiff to recover. For if defendant was not negligent, or if, being negligent, plaintiff was not injured thereby, there is no cause of action. The court below must have concluded that there was evidence sufficient to establish the affirmative of both the propositions. Looking at the case as presented here upon the cold record, and it must be said: (1) That plaintiffs made a case entitling them to a verdict. (2) The case made by the defense on its face was sufficient to fully justify the jury in the belief that the injuries of plaintiff were simulated, and to uphold the verdict in favor of defendant. The opportunity of the court below to determine as to the credibility of witnesses, the bias and prejudice, if any, exhibited by them, and generally to divine the truth in the conflicting evidence presented, gave him a decided advantage over us when seeking the same object. It has long been held that, where the evidence is dubious and conflicting, the supreme court will not, although it may differ in opinion from the lower court, revise the discretion of the court below in granting or refusing a new trial, unless there is abuse of such discretion: Taylor v. McKinley, 4 Cal. 104; Walton v. Maguire, 17 Cal. 92; Low v. McCallan, 64 Cal. 2, 27 Pac. 787; Savage v. Sweeney, 63 Cal. 340. A large number of cases might be

cited to like effect, but these will suffice. The evidence presented a substantial conflict, and we are not prepared to say there was an abuse of discretion by the court below in granting a new trial. The order appealed from should be affirmed.

We concur: Temple, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is affirmed.

GERMAN v. BROWN.

No. 15,073; May 13, 1893.

33 Pac. 58.

Appeal.—Where the Court's Findings Support the judgment, and are on all material issues, the judgment will be affirmed.

APPEAL from Superior Court, San Benito County; N. A. Dorn, Judge.

Action by Pedro German against H. Brown. Judgment for plaintiff. Defendant appeals. Affirmed.

Montgomery & Hill for appellant; Briggs & Hudner for respondent.

VANCLIEF, C.—This action was commenced in the court of a justice of the peace to recover damages for an alleged trespass by defendant upon plaintiff's land. The alleged title and possession of the plaintiff being denied, the case was transferred to the superior court, wherein the cause was tried without a jury, and judgment rendered in favor of plaintiff for $80 damages, and costs taxed at $50.35. The defendant appeals from the judgment, and from an order denying his motion for a new trial. The only grounds upon which appellant's counsel ask a reversal of the judgment or order are expressed in their brief as follows: "The findings of facts do not support the judgment and the judgment is against law.

The uncontradicted evidence is that appellant had possession of the land in question at the time of entry of respondent." The court found upon all the material issues, and the finding supports the judgment. The statement on motion for a new trial contains no sufficient specification of any particular in which it is claimed that the decision is not justified by the evidence. I think the order and judgment should be affirmed.

We concur: Searls, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

JACOBS v. WALKER.

No. 14,976; May 13, 1893.

33 Pac. 91.

State Lands—Contest.—The Fact That Plaintiff's Application to purchase state land, of some portion of which he is in possession, has been adjudged invalid, and that it has been determined that he has no right to purchase, makes him none the less a proper party to proceedings to determine a contest inaugurated by a protest in the surveyor general's office against the purchase of the land by defendant. Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620, and Perri v. Beaumont, 91 Cal. 30, 27 Pac. 534, followed.

State Lands—Application to Purchase.—The Amendatory Act of 1885 which does not require an application to purchase state land, not suitable for cultivation, to state that the applicant is an actual settler, does not cover applications made before its enactment, and render unnecessary proof that one previously applying is an actual settler, as required by the old statute.

Where, on Appeal, a New Trial is Ordered Without Limitation for a specified reason, the new trial should not be limited to the one issue discussed.[1]

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[1] **Cited** and followed in Corporation etc. Church of Latter Day Saints v. Watson, 27 Utah, 540, 76 Pac. 707, where a reversal of judgment and order for a new trial, made generally and without restriction as to points, was held in effect to leave the case open on all issues as if never tried at all.

55 EH

APPEAL from Superior Court, Mendocino County; Robert McGarvey, Judge.

Proceedings by Abner D. Jacobs against J. B. Walker to determine their right to purchase state lands. From a judgment for defendant and order denying a new trial, plaintiff appeals. Reversed.

T. L. Carothers for appellant; J. A. Cooper for respondent.

TEMPLE, C.—This is a contest in regard to the right to purchase state lands, and this is the second appeal to this court: 90 Cal. 43, 27 Pac. 48. On the first trial it was found that plaintiff in his application to purchase had falsely stated that there was no possession of any portion of the land adverse to his possession. It was found that in every other respect the matters stated in his application were true, but because of the one false statement it was adjudged that his application was invalid. This finding was affirmed on the former appeal. As to the defendant it was said that there was no finding that he was an actual resident upon the land, nor did it appear that there might not be some part of the land, equal to a legal subdivision, which was suitable for cultivation. The judgment was therefore affirmed as to plaintiff's claim, and as to the defendant it was reversed, and a new trial ordered. The complaint shows that the land in dispute is a part of a thirty-sixth section. That the defendant applied to purchase on the 23d of February, 1883, which application was approved May 3, 1883, and a certificate of purchase issued to defendant June 16, 1883. That plaintiff made his application May 6, 1884, and at the same time filed with the surveyor general a verified protest in writing against the issuance of any further evidence of title to the defendant. Attached to the complaint is the certificate of the surveyor general to the fact of the protest, and referring the contest to the courts for determination. Defendant's answer fails to deny that there was a protest, and that there was is found by the court. Yet respondent in his brief claims that plaintiff has not protested, and that the contest was not inaugurated in the state land office. He contends that as it was adjudged that the plaintiff's application to purchase was

invalid, and it has been determined that he has no right to purchase, the contest is ended so far as plaintiff is concerned, and he is out of the case. Of course, if this be so, plaintiff is not a party and cannot appeal. It would seem, also, that if the contest inaugurated by plaintiff's protest is ended, the courts have no further jurisdiction of the matter. For where there is no contest, the surveyor general must himself determine such questions as arise. As authority for this proposition he cites Ramsey v. Flournoy, 58 Cal. 260. But that case was expressly overruled in Perri v. Beaumont, 91 Cal. 30, 27 Pac. 534. So far as this question is concerned, I am unable to find any difference whatever in the last-named case and this. In both, the contest was inaugurated by a protest in the surveyor general's office by one who appeared on the face of the record to have made no valid application to purchase, though both had filed formal applications, and both were found to be in possession of some portion of the land. And in these respects both cases seem to be exactly like Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620. In those cases this point was fully discussed, and the matter need not be again considered. According to those cases, plaintiff is a proper party, and is entitled to be heard.

Respondent further contends that the specifications in the notice of the motion for a new trial, which was made upon the minutes of the court, as to the alleged insufficiency of the evidence, are defective. One is to the effect that there was no evidence tending to show that the defendant was an actual settler upon the land when he applied to purchase. At the time defendant made his application to purchase, 1883, it was necessary to state in the application that he was an actual settler upon the land. Of course, unless this statement were true, he had no valid application to purchase, and he would be left in the same position as the plaintiff. The statute was amended in 1885, so that this statement was not required when the lands were not suitable for cultivation. This does not cover applications made before that time which were invalid when made. This defect in the findings was noticed on the last appeal, but as it was not important, since a new trial was ordered, the consequences of such failure were not commented on. But this was a material issue on the last trial, and, if there was no evidence upon that issue,

the case must be reversed. This specification is therefore sufficient.

The statement shows that there was no evidence whatever upon this subject, and that there was not because the learned judge concluded that a new trial was ordered only upon the one issue—whether the land was suitable for cultivation. I see no warrant for such a conclusion. The judgment here ordered a new trial, and there was no hint at any restriction as to the scope of such new trial. The order is in the usual form, and there is no more justification in claiming that the new trial was to be limited than in the numerous cases in which the same language is used, found in every volume of our Reports. It is not uncommon to send back a cause for a new trial because the court has failed to find upon some one material issue. Yet no one ever supposed, because the particular defect was specially pointed out in the opinion, that the new trial was limited thereby to the one issue discussed. The opinion is not the judgment, although it may constitute the law of the case. When a new trial is ordered without limitation, it must be understood, as it always has been, that a new trial is ordered in the whole case. It is said that the court based its action on the case of Chandler v. Bank, which was three times appealed to this court: 61 Cal. 401; 65 Cal. 498, 4 Pac. 502; 73 Cal. 317, 2 Am. St. Rep. 812, 11 Pac. 791, and 14 Pac. 864. I see no similarity in the cases, and, if the case cited were authority for the position, it would simply be one case against a thousand others running through the entire Reports. But that case is not authority for the position. On the first appeal the court noticed that the findings sustained the judgment in all respects except as to the matter of interest, and it was adjudged that the case be reversed, and remanded for further proceedings in accordance with the opinion. The doubt as to the meaning of this order arose from the fact that the court did not award a new trial. The lower court did not understand what the further proceedings could be when a new trial was not ordered. It therefore refused to retry the case, but simply struck out certain interest, which the findings did not show could be legally charged, and refused to receive further evidence which would show that the interest was authorized in accordance with the requirements of our statute. A new appeal

was taken, and an opinion rendered, which, as I think, was unfortunately worded. The writer of the opinion, Judge Thornton, thought it held that a new trial was awarded in the whole case. But the trial court understood it as holding that a new trial was to be had on one issue only, and that conclusion was sustained by a majority of this court on the third appeal, Judge Thornton dissenting. The case went off upon some unfortunate use of language, but on no possible construction is it authority for the course pursued in this case, where a new trial was ordered without restriction. No such new trial has been had, and therefore a discussion of other interesting questions suggested would be premature. I think the judgment and order should be reversed and a new trial had.

We concur: Belcher, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered.

GALVIN v. GUALALA MILL CO.

No. 14,414; May 13, 1893.

33 Pac. 94.

Fires—Treble Damages—Manner of Fixing.—Since Political Code, section 3344, providing for treble damages to the party injured by the negligent setting out of fires, is silent as to whether the jury shall find such damages, or whether they shall find the actual damage, and the court shall enter judgment for three times such amount, it is immaterial which course is pursued, provided absolute certainty is attained, and this can be secured by preparing the form of verdict.

APPEAL from Superior Court, Mendocino County; Robert McGarvey, Judge.

Action by M. J. C. Galvin against the Gualala Mill Company for damages for setting out a fire. From an order denying his motion that judgment be entered for three times the amount named in the verdict, plaintiff appeals. Appeal dismissed.

J. A. Cooper for appellant; H. A. Powell and T. L. Carothers for respondent.

HAYNES, C.—This appeal is from a judgment rendered in favor of appellant, because of the refusal of the court to treble the damages found by the jury in his favor. The action is based on section 3344 of the Political Code, and the complaint charges that certain property of the plaintiff, consisting of tan-bark, cordwood, etc., was destroyed by a forest fire negligently started by the defendant on its own land, and which defendant negligently permitted to spread to other lands, whereby said property was destroyed. The jury returned the following verdict: "We, the jury in this cause, find a verdict for the plaintiff, and fix the damages at $775." Plaintiff, before judgment had been entered, moved the court for an order directing judgment to be entered for three times the amount named in the verdict, which motion was denied, and plaintiff took a bill of exceptions. The question presented on this appeal is of no importance, so far as the action of the court complained of affects the parties, inasmuch as the defendant appealed from the same judgment, and from an order denying its motion for a new trial, and upon that appeal the judgment and order have been reversed: See Galvin v. Mill Co., 98 Cal. 268, 33 Pac. 93 (No. 14,404, this day filed). However, in view of the possibility of a new trial, it may be said that the code is silent as to whether the jury shall find treble damages, or whether they shall find the actual loss or damage, and the court enter judgment for three times that amount. We think it immaterial which course is pursued, provided absolute certainty is attained, and this can be secured by preparing the form of the verdict. Respondent, on this appeal, contends that an instruction given to the jury at plaintiff's request, together with the form of the verdict, left it uncertain whether the jury had trebled the damages or not, and if that were true the motion was properly denied. As the judgment has already been reversed upon defendant's appeal, this appeal should be dismissed.

We concur: Temple, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the appeal is dismissed.

PATTON et al. v. THOMSON.

No. 15,019; May 13, 1893.

33 Pac. 97.

Mortgage Foreclosure—Recovery of Proceeds of Void Sale.—A complaint in an action by a mortgagor to recover, under Code of Civil Procedure, section 957, the proceeds of a foreclosure sale set aside on appeal, alleged that foreclosure proceedings were commenced against plaintiff, in which defendant, a second mortgagee, was joined as a party, and filed a cross-complaint asking a foreclosure of his mortgage; that an order of sale on the judgment foreclosing both mortgages "was duly issued by the clerk, ... and was thereupon delivered to the sheriff," who sold the land to defendant, and after paying the first mortgage "there remained the sum of $3,080." Held, that the complaint was demurrable, as it did not show that the sheriff had applied any part of the proceeds of such sale to the satisfaction of defendant's debt.

APPEAL from Superior Court, Mendocino County; Robert McGarvey, Judge.

Action by Milo Patton and James A. Foster, administrators of James H. Patton, deceased, against David Thomson, to recover the proceeds of a void foreclosure sale. From a judgment for defendant, plaintiffs appeal. Affirmed.

T. L. Carothers for appellants; J. A. Cooper for respondent.

VANCLIEF, C.—In this case a demurrer to the complaint was sustained by the court below, and, as plaintiffs declined to amend, judgment passed for defendants. Plaintiffs bring this appeal from the judgment on the judgment-roll, and contend that the court erred in sustaining the demurrer. The material substance of the complaint may be briefly stated as follows: In May, 1887, George E. White commenced an action to foreclose a mortgage executed by Milo Patton and J. H. Patton on a tract of land owned by them, to which action the defendant herein, David Thomson, was made a party defendant on the ground that he claimed a subsequent lien upon the mortgaged land. Thomson appeared, and filed a cross-com-

plaint setting up his subsequent mortgage executed by Milo and J. H. Patton on the same land, and praying that it be foreclosed, but failed to serve his cross-complaint on the Pattons, his codefendants, against whom he prayed for such relief. In October, 1887, the Pattons having failed to answer or appear, the court decreed a foreclosure of each mortgage, ordered a sale of the land, and directed the proceeds of the sale to be applied—First, to the payment of $5,127 found due on White's prior mortgage; and, second, to the payment of $4,500.34 found due on Thomson's subsequent mortgage; and further ordered the docketing of a judgment in favor of Thomson against the mortgagors for any deficiency, etc. On November 28, 1887, in pursuance of the order of sale, the sheriff sold the mortgaged land to Thomson for the sum of $8,400, and, no redemption having been made within the time limited by law, conveyed the land to Thomson. In September, 1888, the mortgagors (the Pattons) appealed from the judgment of foreclosure, whereupon in December, 1890, so much of the decree as pertained to the foreclosure of Thomson's mortgage, and the docketing of a judgment in his favor, was reversed, and "the cause remanded," for the reason that Thomson's cross-complaint had been served on the mortgagors: 87 Cal. 151, 25 Pac. 270. The remittitur was filed in the lower court January 17, 1891, but it is not alleged whether or not there has been any further proceeding in the case since the filing of the remittitur. The proceeds of the sale of the mortgaged property ($8,400) exceeded the amount necessary to satisfy White's prior mortgage and costs by the sum of $3,080.32, but what disposition was made of this excess is not alleged. J. H. Patton having died December 1, 1890, letters of administration upon his estate were issued to James A. Foster May 26, 1891. Upon these facts the plaintiffs demand judgment against the defendant for $3,080.32, the excess of the proceeds of the foreclosure sale after payment of White's prior mortgage and costs.

The appellants found their right of action upon the second clause of section 957 of the Code of Civil Procedure, which provides that in cases of reversal or modification of a judgment "the appellant may have his action against the respondent enforcing [who may have enforced] the judgment, for the proceeds of the sale of the property, after deducting

therefrom the expenses of the sale." The words in brackets are inserted in the above quotation as expressive of the intended meaning of the word "enforcing," immediately preceding, and for the same purpose a comma is inserted after the word "judgment"; for it could not have been intended that the "relief" which the appellant may have under this clause is the "enforcing" of the judgment which had been reversed or modified. The complaint shows that there were two judgments of foreclosure—one in favor of the plaintiff White, foreclosing his prior mortgage, and the other in favor of the defendant, Thomson, on his cross-complaint, foreclosing his junior mortgage; but it is not alleged that Thomson ever enforced his judgment, nor that it ever was enforced. The allegation is that "an order of sale upon the judgment so rendered in said action of George E. White against Milo Patton, J. H. Patton, David Thomson, and Henry Marks was duly issued by the clerk of said court, and was thereupon delivered to the sheriff." Not even the substance of the order of sale, or any part thereof, is stated. In all this there is no implication that the sheriff was ordered to sell, or did sell, by virtue of the decree in favor of Thomson in his cross-action, nor that the sheriff applied any part of the proceeds of the sale to the satisfaction of Thomson's mortgage. From the allegations that the sheriffs sold the land to Thomson for $8,400, and, after satisfying the decree in favor of White, "there remained the sum of $3,080.32," the presumption is that Thomson paid to the sheriff the full sum of the purchase money, and that the excess of $3,080.32 "remained" with the sheriff, who, for aught that is alleged, may have held it for the use, and subject to the order of, the plaintiffs herein. I think the court did not err in sustaining the demurrer, and that the judgment should be affirmed.

We concur: Haynes, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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COLEGROVE et al. v. SMITH et al.*

No. 14,922; May 20, 1893.

33 Pac. 115.

Independent Contractors—Liability for Negligence.—Where a person obtains from a city, by ordinance, license to lay pipes along its streets, he will be liable for injuries resulting from the negligent manner in which such work is done, even though the work is not done by himself, but by an independent contractor employed by him for that purpose.

APPEAL from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Margaret H. Colegrove and H. H. Colegrove against Fred J. Smith and others to recover for injuries received by Margaret Colegrove through defendants' alleged negligence. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

Joy & Sumner, C. E. Sumner and Edwin E. Meserve for appellants; A. W. Hutton, P. C. Tonner and J. W. Swanwick for respondents.

HAYNES, C.—Action for personal injuries. Appeal by defendants from the judgment and an order denying a new trial. Appellants, as copartners doing business under the name of the Citizens' Water Company of Pomona, obtained from the city of Pomona, by ordinance, a grant or franchise to dig trenches and lay pipes in the streets of the city for the purpose of selling to and supplying its inhabitants with water. Afterward, on June 1, 1889, appellants contracted with M. O'Neill and Frank Osler to dig and fill the trenches for the pipe at a specified price per one hundred feet, a part to be two feet wide, and part twenty inches wide, and all thirty inches deep. The contract contained the following clause: "Said ditches to be filled as required by city ordinance; all road crossings to be properly tamped, and kept in repair for sixty days after completion of the work; parties digging ditch

*Rehearing granted.

to be responsible for all damages resulting by reason of injury to or breaking of any pipes owned by other persons." The ordinance required the grantees (appellants) or their assigns, immediately after laying the pipes, to restore the streets to their former condition, and have the same in as good repair as before; the work to be done under the direction, and to the satisfaction, of the superintendent of streets. Plaintiff, Margaret H. Colgrove (wife of her coplaintiff), on June 15, 1889, was driving along Garey avenue, where defendants' pipe had been laid, and the trench improperly filled with loose dirt, in which her buggy wheels sank, whereby she was thrown out and injured. There were no guards along the line of the trench, nor any notice of its unsafe condition. Several exceptions were taken to evidence, and to the refusal of the court to give to the jury certain instructions requested by defendants; but all these exceptions present a single question, arising upon the issue raised by defendants' answer, to the effect that O'Neill and Osler were independent contractors, in the exclusive control of the work of filling up the ditch, and for whose negligence defendants claim they are not liable.

It is commonly said—and, in a large class of cases, correctly—that the principle of respondeat superior does not apply where the negligent or wrongful act is that of an independent contractor, or of his servant or employee, unless the superior has been guilty of negligence in contracting with an unfit person. For a full discussion of the general doctrine above stated, see Boswell v. Laird, 8 Cal. 469. But there are exceptions to the general doctrine, and this case, I think, is one of them. The board of trustees of the city was charged by the law with the care and maintenance of the streets in a safe and proper condition for the use of the public. Appellants could not lawfully dig trenches and lay water pipes without express authority from the city. If they had undertaken to do so, and had contracted with another to do the work, they would not by such contract have relieved themselves from liability to the city for the trespass, nor to individuals who might have sustained special injury. Nor does the fact that they obtained from the city a franchise or permission to dig up the street, and lay their pipes, relieve them from more than the unlawful character of the work. They stand in a contract relation to the public, represented by the

city authorities, to do the work in the manner required by the ordinance, and cannot relieve themselves of the duty imposed by that contract by contracting with another to do the work. These trenches could not be dug in the street without danger to the public. If done without authority, a nuisance would necessarily be created, and, if not done in the manner required by the ordinance, the departure creates a nuisance. It is very different from the erection of a building, or the doing of other work upon private property, which does not constitute a nuisance, and which causes no danger to the public unless negligently performed. The owner, in such case, is under no contract relation to the public. He owes a duty, however—that of care to prevent accidents; but when he selects a competent workman, and intrusts the whole work to him, he discharges that duty. But if I am under a duty to another, created by contract or by statute, it is obvious that I cannot relieve myself of any of its obligations by contracting with another to do the same work; or, if a work which I may lawfully do creates a danger to others, I cannot escape liability by contracting with another to do it; for by contracting with another I authorize him to create the danger. But where the work is unattended with danger, except from negligence, a contract to do the work excludes negligence, and the contractor is liable. Attention is not called by counsel to any case in this court where the question here presented appears to have been considered, but authorities elsewhere are abundant, and quite generally uniform in support of the views above expressed. In Gray v. Pullen, 5 Best & S. 970, A was empowered, under the metropolis local management act (18 & 19 Vict.), to make a drain from his premises to a sewer by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B. Held, that A was responsible in an action by B. In Bower v. Peate, 1 Q. B. Div. 321, 326, Cockburn, C. J., said: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot

relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done, from which mischievous consequences will arise unless preventive measures are adopted." In Pickard v. Smith, 10 Com. B., N. S., 470, the defendant, having employed a coal merchant to put coals into his cellar, was held liable for injury suffered by the plaintiff from his falling through the cellar opening, which had been left open by the negligence of the coal merchant's servants. In this case, after referring to the general rule placing the liability upon an independent contractor, the court said: "That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned."

Appellants contend that in this state municipal corporations are not liable for injuries resulting from imperfections in the streets, and upon this ground attempt to distinguish this case from a large number of cases where the city was primarily liable, and also from other cases where the person or corporation which had obtained permission to do the work had agreed with the city to be answerable for all damages that might be sustained. Whether or not the city of Pomona was liable for the injury to respondent is immaterial. The contractors, O'Neill and Osler, were undoubtedly liable, and, if so, appellants would have been liable had they done the work themselves; and the question here is whether they did or could relieve themselves from responsibility by letting the work to independent contractors. Nor does the fact that there was not an express contract between appellants and the city to answer all damages at all affect the question, since the implied obligation arising from the franchise and the character of the work imposed upon them a liability for injuries caused by their negligence, in every respect as conclusive as an express contract. Chicago City v. Robbins, 2 Black, 418, 17 L. Ed. 298, Robbins v. Chicago, 4 Wall. 657, 18 L.

Ed. 427, and Water Co. v. Ware, 16 Wall. 566, 21 L. Ed. 485, all sustain the view we have taken. Woodman v. Railroad Co., 149 Mass. 335, 14 Am. St. Rep. 427, 4 L. R. A. 213, 21 N. E. 482, and Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421, on appellants' brief, are directly against them. The first of these cases was that of a street railway corporation which employed a contractor to lay a new track in a city street, and through whose negligence in not properly guarding the work the injury happened. The railway company was held liable. The court said: "If the performance of a lawful contract necessarily will bring wrongful consequences to pass, unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer, at his peril, to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs." In the American cases above referred to will be found cases cited from many of the states sustaining the same doctrine. Appellants, however, seem to rely principally upon the case of Atlanta etc. R. R. Co. v. Kimberly, 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277, and Fulton County etc. R. R. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828. In the first of these cases the court recognizes and enumerates the exceptions to respondeat superior, but concludes that the facts do not bring it within any of the exceptions. The correctness of its conclusion in that case may well be doubted, though whether correct or not need not be considered here, since the case at bar comes clearly within the second exception to the general rule there stated, and to which the learned justice cites Bower v. Peate, and Pickard v. Smith, supra. The broad distinction between that case and the case at bar is apparent, since the trenches could not be dug in the streets of Pomona without danger to those having occasion to use the street, while a railroad embankment could be constructed without danger of creating a nuisance by impounding water which by stagnation produced malaria, and thereby became a nuisance. The second case (Railroad Co. v. McConnell) supports appellants' contention, but the court clearly came to a wrong conclusion. But three cases are cited in support of the conclusions reached by the court. One of these (Overton v. Freeman, 11 C. B. 867) was a "common pleas"

decision made in 1852, and which is in direct conflict with Gray v. Pullen, 5 Best & S. 970 (decided in 1864, in exchequer chamber, on appeal from queen's bench); and upon the appeal Overton v. Freeman was not only cited in the argument, but quoted from, and, though it is not referred to in the opinion, it was clearly overruled. Another of the cases there cited is Hackett v. Telegraph Co., 80 Wis. 187, 49 N. W. 822. There the defendant contractd with a railroad company to erect for it a line of telegraph. A hole was left unguarded overnight, into which a child fell, and was injured. A clear distinction between that case and the one at bar is stated by the court as follows: "The railroad company was not required, by its contract, to dig any hole in a traveled public street"; while here the work was required to be done in a public street in a city, and the negligence was in doing improperly that which the contract required to be done, and not in some matter collateral to, and not required to be done in the performance of, the contract. The other case referred to in the case of Fulton County etc. R. R. Co. v. McConnell is that of Atlanta etc. R. R. Co. v. Kimberly, above noticed.

The judgment and order appealed from should be affirmed.

We concur: Vanclief, C.; Temple, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HIBBERD v. MELLVILLE.

No. 15,001; May 20, 1893.

33 Pac. 201.

Highways—Dedication—Evidence.—In an Action for Trespass, where defendant alleges that the land entered on was a public highway, it appeared that the line of the road for nearly its whole length had been changed from time to time by the owner of the land; that during all the time the public had been permitted to use the road it had been barred by several gates, to be opened and closed by persons passing over it; that for twelve years no work had been

done or public money expended thereon by the road overseers; and it did not appear that there had been before that time. Held, that the road had not become a highway by dedication.

Highway—Dedication—Evidence.—A Question, "For the Last ten or fifteen years, how many people have used that road or traveled it?"—was properly excluded, since its answer would not have shown an intention of the owners to dedicate the road to the public.

APPEAL from Superior Court, Mendocino County; Robert McGarvey, Judge.

Action by Elizabeth A. Hibberd against Charles A. Mellville, to recover damages for an alleged trespass. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Cooper for appellant; T. L. Carothers for respondent.

BELCHER, C.—This is an action to recover damages for trespasses alleged to have been committed by the defendant in entering upon the land of the plaintiff, riding over and across the same, and cutting down a gate thereon. The defense set up in the answer and relied upon at the trial was that the gate cut down was upon a road which had become a public highway by dedication and user by the public for more than fifteen years. The complaint alleged that the plaintiff had been damaged by the trespasses complained of in the sum of $325, but the court found that she was damaged by the cutting of the gate only, and in the sum of $5, for which sum, with costs, judgment was given in her favor. The defendant moved for a new trial, which was denied, and has appealed from the judgment and order.

The principal question presented for decision is as to whether or not there was a public highway extending across plaintiff's land, and over which the defendant had a right to travel. It is not pretended that the road was ever laid out or established as a highway under the provisions of the code, and the only question is, Had it been dedicated by the owners of the land, and accepted and used by the public, so as to constitute it a public highway? The findings of the court are very full, covering all the probative as well as the ultimate facts, and so far as they need be stated are as follows: "That the plaintiff and her predecessors in title have permitted the defendant and his neighbors . . . . to pass over the land of

plaintiff. . . . . While they have been so traveling over the said land of the plaintiff for more than twenty years without any express understanding between the public and the plaintiff or her predecessors, the route has never been confined to one place for any considerable length of time, and has always been under the control of the plaintiff and her predecessors in title, and has been changed by her and them at their pleasure; and there have during all of said time been gates kept up by the plaintiff and her said predecessors on the route or routes traveled across the land of plaintiff, and at the time of the commencement of this action, and on the said twenty-second day of April, 1891 (the day the gate was cut down by defendant), there were, and are now, five gates maintained by the plaintiff on the said route so traveled by the defendant and others. From said dwelling of plaintiff to the north side of her lands she has a lane, across which she has three of said gates, and between two of them the lane widens out, so that plaintiff uses the space between them as a corral, and what travel passes over said road passes through said corral. That plaintiff and none of her predecessors in interest in said land ever intended to dedicate a right of way to the public across said land, and they, or neither of them, have ever so dedicated to the public such right of way. That the road claimed by the defendant to be a public highway across the lands of the plaintiff has never been accepted by the public as a public road, and the road overseers of the road district in which the said lands are situated have not for a period of eleven years next prior to the trial of this action, or at any other time. caused any work to be done thereon, or any public money to be expended thereon, and have never in any way exercised any acts of control or jurisdiction over the same." Appellant contends that these findings were not justified by the evidence, and this is the main point relied on for a reversal.

"The vital principle of dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. . . . . If accepted and used by the public in the manner intended, the dedication is complete, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circum-

stances of each particular case." But "dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner": Harding v. Jasper, 14 Cal. 648; Quinn v. Anderson, 70 Cal. 456, 11 Pac. 746; Ang. & D. Highw., secs. 142, 147. In this case it was clearly proved that the line of the road for nearly its whole length had been changed from time to time by the owners of the land, and that for about twelve years before the trial no work had ever been done on the road by the road overseers, and no public money expended thereon. As to whether any work had been done on it by the overseers or money expended before that, the evidence is silent. And speaking of this road and its changes, Robinson, one of plaintiff's predecessors in interest, testified: "As long as they did not interfere with me they could use it. If it had interfered with me I would have raised an objection. I did not intend at the time to part with the title to the land, or give a permanent road there." It was also proved without contradiction that during all the time the owners had permitted the road to be used by the public it had been barred by several gates to be opened and closed by persons passing over it; and, as said in Quinn v. Anderson, supra, this, in the absence of a statute providing that such gates may be maintained on a public highway, "has always been considered strong evidence in support of a mere license to the public to pass over the designated way, and in rebuttal of a dedication to public use." See, also, Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935, where this language is quoted and approved. Looking, then, at all the evidence in the light of the authorities above quoted, we do not think it can be said that the owners of the land ever manifested an unequivocal intention to dedicate the road in question to the use of the public; and it must follow, therefore, that the judgment cannot be reversed for want of evidence to justify the findings.

The point is also made that the court erred in sustaining objections to certain evidence offered by defendant, but we see no material error in the rulings complained of. Counsel asked the witness Adams: "Since 1876, for the last ten or fifteen years, how many people have used that road, or traveled it?" The question was clearly immaterial, for the reason that the answer, if given, would not have shown or tended to show an intention on the part of the owners to

dedicate the road to the public. Besides, it had already appeared in the testimony that the number was "three or four families." Counsel also asked the witness Ledford: "Did Mr. Kelso tell you, in that conversation about raising money to make a better grade from his house to the county road, that the citizens helped him?" One of the grounds of objection to the question was that it was leading, and that it was so is evident. The objection was therefore properly sustained. We advise that the judgment and order be affirmed.

We concur: Vanclief, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

GREENBERG v. CALIFORNIA BITUMINOUS ROCK COMPANY (JOHNSON, Intervener).

No. 19,146; May 26, 1893.

33 Pac. 192.

Vendor's Lien—Action to Foreclose—Intervention.—In an action to foreclose a vendor's lien, a third party intervened, and asked a foreclosure of an interest claimed by him. Plaintiff denied the allegations of intervener's complaint, and thereupon dismissed his action. Defendant made default. Held, that a decree finding intervener had the interest claimed, but denying him a foreclosure as to such interest, was erroneous.[1]

APPEAL from Superior Court, San Luis Obispo County; V. A. Gregg, Judge.

Action by Meyer Greenberg against the California Bituminous Rock Company to recover the price of, and enforce a vendor's lien on, certain land, in which C. B. Johnson inter-

[1] Cited as an element in the history of the case in Greenberg v. Cal. Bituminous Rock Co., 107 Cal. 674, 40 Pac. 1055, which was a second appeal, and denied as authority there on an issue affected by amendments of pleadings required by the decision on the first appeal.

vened, and claimed an interest. Plaintiff answered intervener's complaint, and thereupon dismissed his action, while defendant made default. From the judgment entered, and from an order denying a new trial, intervener appeals. Reversed.

Luis Laney for plaintiff; T. C. Van Ness for intervener; Graves & Graves for respondent.

SEARLS, C.—This is an appeal from a final judgment, and from an order denying a new trial. The action was brought to recover $25,000, the purchase price of certain land conveyed by the plaintiff to the defendant, and to enforce a vendor's lien upon the land conveyed. C. B. Johnson, the intervener, filed his complaint of intervention, in which he set out that the plaintiff held the property in part as a trustee for intervener and one L. M. Warden; that the interest of intervener was a one-fourth share or interest therein. He denies, on information and belief, that the purchase price of the land was $25,000, but avers that defendant (a corporation), as the consideration for the sale of the land, was to deliver twelve hundred and fifty shares of the capital stock of the corporation defendant (being the whole capital stock), as follows: three hundred shares each to plaintiff, Warden, intervener, and Underhill, and fifty shares to Ernest Graves; that defendant never delivered any of the shares or other consideration; and that no security was given. Intervener prays that, if it shall appear that the sum of $25,000 shall appear to have been the consideration, a decree in favor of plaintiff be entered as prayed for in the complaint; that, if it shall appear that the stock was to be delivered, a decree of foreclosure be entered in favor of plaintiff in consonance with the facts stated in the complaint of intervention; and that in either case intervener's interest in the judgment be established to the extent of his interest in the land, etc. The complaint of intervention was served upon the plaintiff and defendant, the latter of whom made default. Plaintiff denied all the allegations of the complaint, and thereupon dismissed his action. The cause was tried by the court, and written findings filed upon which judgment was entered, whereby it was decreed that, at the date of the sale of the land to defendant,

plaintiff held one-quarter of the property in trust for intervener, and that the latter, upon the payment of one-third of the amount due on a promissory note for $2,937.50, executed by plaintiff, Greenberg, L. M. Warden, and the intervener, as found in the findings, will be entitled to have issued to him by defendant three hundred shares of the capital stock of the defendant corporation.

The judgment and order appealed from are erroneous, in this: The defendant being in default, intervener was entitled to a decree of foreclosure, as prayed for against it. Whether the stock was to be delivered only upon the payment of the promissory note as found by the court was not an issue as between intervener and defendant, and, as the plaintiff did not set it up as against intervener, it is hard to see how it had any place in the evidence. The case is a peculiar one in some respects, and the pleadings should be so amended as to make plaintiff, who dismissed his case, a defendant, or by such further statements as, in the light of the proceedings and affidavits on file, will enable the court below to glean all the facts, and do complete justice to all the parties. The judgment and order appealed from should be reversed, and a new trial had, with leave to the parties intervener and plaintiff to amend their pleadings as they may be advised.

We concur: Vanclief, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered, with leave to the parties intervener and plaintiff to amend their pleadings as they may be advised.

BRODER v. SUPERIOR COURT OF MONO COUNTY.

No. 15,169; May 27, 1893.

33 Pac. 630.

Writ of Review—When Denied.—The Petition for a Writ of review to an order vacating a judgment for petitioner will be denied, where it appears that petitioner appealed from the same order, and the questions sought to be reviewed have been determined thereon.

Original application by John Broder for a writ of review to the superior court of Mono county. Application denied.

Richard S. Miner for appellant; P. Reddy for respondent.

PER CURIAM.—The petitioner seeks herein for a review and annulment of an order of the superior court of Mono county, made May 13, 1892, striking from the files, and canceling of record, a certain document, purporting to be a judgment in the action of Broder v. Conklin, then pending in said court. The application for the writ was filed in this court September 2, 1892, and upon the return thereto it appeared that the petitioner herein took an appeal to this court from the same order on the eleventh day of July, 1892. That appeal having been heard and determined at the instance of the appellant (98 Cal. 360, 33 Pac. 211), it is evident that the grounds upon which he is entitled to ask for the writ of review do not exist, and the application therefor is denied.

McKENZIE v. GILMORE.

No. 18,067; June 3, 1893.

33 Pac. 262.

Highway—Dedication—What Constitutes.—Defendant, for the purpose of changing the course of a highway, opened a road through his land, fenced it on both sides, allowed it to be used by the public, and to be worked and controlled by the public authorities. Held, that the road was dedicated to the public.

Highway—Dedication—Revocation.—Where a person dedicates land for a public highway he cannot afterward reclaim the same by showing that he was induced to make such dedication by the promise of a neighbor to give him the use of other lands, and that he had ceased to use such lands.

Highway—Dedication—Abandonment.—A petition asking that a highway be vacated was presented to a board of supervisors. Viewers were appointed, and in their report they recommended that the highway be made a private road, and that the owners of the land over which the road passed give a deed to the county for the private road. The board made an order adopting the report, but no deeds of the land were ever made. Held, that the order of the supervisors was not an abandonment of the highway.

APPEAL from Superior Court, Tehama County; Edward Sweeney, Judge.

Action by Isaac McKenzie against John Gilmore to cause obstructions to be removed from a highway. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

N. P. Chipman for appellant; L. V. Hitchcock and J. T. Matlock for respondent.

TEMPLE, C.—This is an action brought by a road overseer to cause certain obstructions to be removed from the public highway. The cause was tried with the aid of a jury, which found for the defendant. The plaintiff appeals from the judgment, and from an order refusing a new trial.

There are numerous assignments of error in the record, but I think it necessary to notice but a few of them. The existence of the highway for a portion of the way was shown by proceedings before the board of supervisors, which resulted in an order establishing the road. Between certain points this road had been changed by one Hickman, who opened a road across his land, fenced it on both sides, and allowed it to be used by the public, and to be worked and controlled by the public authorities. The old road had been fenced up. It was claimed that the new road was dedicated by Hickman to the public. Defendant was permitted to show, as rebutting the presumption which would arise from the above and other acts on the part of Hickman, that Hickman had opened the road to the public in consideration of the promise of one of his

neighbors that he should have the use of certain other land if he would allow the new road to be opened, and that subsequently he had ceased to use the land given him as a consideration. This was clearly erroneous. The facts being assumed, there was a complete dedication to the public. The effect of the acts of Hickman, which show a dedication, cannot be qualified by evidence that he was induced to dedicate by his neighbor. If such proof could have any effect, it would strengthen the proof of dedication. He proves that he did dedicate when he shows that he was paid by a neighbor to do so, and tries to avoid the effect of his acts by showing partial failure of consideration. The use was not given to Copeland, but to the public, by acts indicating an offer without condition. It was also error to allow proof that Cone had consented to the obstructions, or had himself obstructed the road at another point, except so far as such proof might tend to discredit Cone as a witness. On the trial the defendant admitted the erection and maintenance of the gates which constituted the obstruction complained of, but justified on the ground that the highway, if one ever existed, had been vacated by the board of supervisors. In this matter it appeared that a petition was presented to the board, signed by the defendant and several others, asking that the road be vacated. A day was set for the hearing, when viewers were appointed, who subsequently reported to the board, stating, among other things, that Gilmore agreed to give Cone and Hickman a private road twenty-five feet wide, and concluding as follows: "Being that a portion of this road has recently been abandoned, we recommend that the road prescribed in this report be made a private road, and that the land owners over which the road passes give a deed to the county for a private road on the route as described above, which is shown more particularly by the accompanying plat." After the filing of this report the board made the following order: "In the matter of the road in Antelope road district, known as the 'Gilmore Private Road,' it was ordered by the board that the viewers' report be adopted." Deeds were not taken from the land owners for the right of way, nor were any steps taken to establish a private road. The last order was made June 5, 1889. Nothing further seems to have been done until December 4, 1889, when the board made an order rescinding an order made April 3, 1889, pertaining to

gates on Gilmore's land, and ordering the road master to open the road to the public.

Under the last order the plaintiff assumes to be acting. Defendant contends that the order of June 5th is an order vacating the road. That a private road could not be established until the public road was first vacated. Therefore, although the report did not in terms recommend that the road be vacated, such is necessarily implied, and by adopting it the board must be held to have vacated the highway, although it was not competent for them to convert it into a private road in that way.

I do not think this position can be maintained. An order vacating a public highway is legislative, and the enactment ought to appear in the order. Great strictness is not required, but, if an order may be helped by such a reference, the report referred to should itself be sufficient to indicate the act determined upon. The statute does not provide for viewers in the matter of the discontinuance of a highway. The provisions in regard to viewers evidently refer only to laying out and altering highways. By the twenty-first section of the county government act of 1883, in force when these proceedings were had, it was provided that the board should cause to be kept a road book containing all proceedings and adjudications relating to the establishment and discontinuance of roads, etc. This matter does not seem to have been entered in such book. The report adopted did not recommend the abandonment of the road, but that deeds be taken of a right of way for a private road twenty-five feet wide, and then the laying out of a private road. The adoption of the report was an indication that the board would pursue that course, but no conveyances were received, and to lay out a private road would seem to require the concurrence of the person chiefly interested: Pol. Code, sec. 2692. Although the board indicated a willingness to pursue that course, it does not appear that they had the power to do so. Under the circumstances, I do not think the order was an abandonment of the highway, and it was therefore error to admit it in evidence over the objection of plaintiff.

This will dispose of many exceptions taken. If the order were excluded, no instructions in regard to its effect would be required. The plaintiff was entitled to an instruction as to

the right of defendant to erect gates across a public highway, and the instruction offered upon that subject should have been given. I think the court erred in giving the fourth and seventh instructions asked for by the defendant. The fourth was upon a matter which had no bearing upon the issues in the case, and the seventh was erroneous. Neither the public nor the county is responsible for unauthorized acts of the board of supervisors. Their acts, when ultra vires, are simply void, and cannot be imputed to the public. I think the judgment and order should be reversed, and a new trial had.

We concur: Vanclief, C.; Searls, C.

PER CURIAM.—For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial ordered.

CLARK v. OLSEN et ux.

No. 18,090; June 3, 1893.

33 Pac. 274.

Fraudulent Conveyance from Husband to Wife.—Where, in an action to set aside a conveyance from a husband to his wife as fraudulent as to plaintiff, a creditor of the husband, the evidence plainly supports a finding that the conveyance was not made with such intent, a judgment for defendants, based on such finding, will not be disturbed.

Pleading—Sham and Irrelevant Parts.—It was not reversible error to refuse to strike out certain parts of the answer as "sham, irrelevant, and redundant," where they could have no effect upon, and were not necessary to support, the judgment.

Fraudulent Conveyance—Evidence.—It was not Error to Exclude certain letters written by defendants to plaintiff, offered to show the financial condition of defendant husband, where the complaint alleged the husband's insolvency, and the answer did not deny it.

APPEAL from Superior Court, San Joaquin County; Joseph H. Budd, Judge.

Action by Howell Clark against A. S. Olsen and wife to set aside a conveyance from said Olsen to his said wife on the ground that it was made with intent to delay, hinder and defraud plaintiff, a creditor of said Olsen. Judgment for de-

fendants. From an order denying his motion for a new trial, plaintiff appeals. Affirmed.

S. Salon Holl and Carter H. Smith for appellant; F. T. Baldwin and Baldwin & Campbell for respondents.

VANCLIEF, C.—The defendants are husband and wife, and this action is in the nature of a creditors' bill in equity, to set aside two conveyances of a certain tract of land (about three hundred and twenty-seven acres) situate in the county of San Joaquin, made by A. S. Olsen to his wife, Anna, on the ground that they were made "with intent to hinder, delay, and defraud the creditors of the said A. S. Olsen, and particularly the plaintiff herein." The separate answers of the defendants admit the conveyances, but deny the alleged intent thereby to hinder, delay, or defraud any creditor of A. S. Olsen. Judgment passed for the defendants, and the plaintiff brings this appeal from an order denying his motion for a new trial.

1. The court found, among other things, that neither of the conveyances was made with intent to hinder, delay, or defraud any creditor of A. S. Olsen, and also found that A. S. Olsen never had any beneficial interest in the land, though the naked legal title had been vested in him for the use and benefit of his wife, whose equitable title was her separate property. Counsel for appellant contend that these findings are not justified by the evidence. If the finding that the conveyances were not made with intent to hinder, delay or defraud the plaintiff, or any other creditor of A. S. Olsen, is justified by the evidence, it disposes of the appeal in favor of the respondents, so far as the facts are concerned, even though creditors may have been hindered and delayed by those conveyances (Bull v. Bray, 89 Cal. 286, 13 L. R. A. 576, 26 Pac. 873; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557); and that the evidence is sufficient to justify this finding is so plainly apparent that no statement of it, in detail, is necessary in this opinion.

2. It is contended for appellant that the court erred in denying plaintiff's motion to strike out certain parts of the separate answers of defendants, on the alleged ground that such parts of their answers "are sham and irrelevant and

redundant." It does not appear that any part of the answers was sham. The seventh paragraph of each answer, alleging the declaration and recording of a homestead by the wife, and the tenth paragraph, alleging a novation of promissory notes from the husband to plaintiff, may be conceded to be insufficient defenses; but the first does not affect the issue as to the intention of defendants to delay or defraud creditors by the conveyance of the land from the husband to the wife, and therefore does not affect, and is not necessary to support, the judgment. As to the novation of the promissory notes, the court found that the plaintiff had obtained a valid judgment upon the original notes, which was a lien upon all real property of A. S. Olsen in the county of San Joaquin. This, by implication, negatived the novation of the notes, and defeated any possible effect on the tenth paragraph of the answer. All the allegations and findings relating to the homestead and to the novation of notes may be stricken from the record without any possible effect upon the judgment. As to other parts of the answers comprehended in the motion to strike out, the most that can be fairly claimed is that some of them are averments of evidentiary facts tending to negative the alleged fraudulent intent of the defendants, and to prove that the entire equitable estate in the land was the separate property of the wife; but this was one of the grounds of the motion. Besides, the striking out of all such parts of the answers would not have curtailed the evidence given upon the issue as to the alleged fraudulent intent.

3. It is claimed that the court erred in excluding certain letters written by defendants to plaintiff, offered by plaintiff to show the financial condition of A. S. Olsen at the time he conveyed the land to his wife. It is averred in the complaint that, at all the times therein mentioned, A. S. Olsen was insolvent, and had no other property not exempt from execution than the land in question. This averment was not denied, and the court expressly found it to be true; therefore the exclusion of the letters was neither injurious to the plaintiff nor erroneous. I think the order should be affirmed.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

DESCALSO v. DUANE.

No. 14,794; June 3, 1893.

33 Pac. 328.

New Trial—Dismissal.—An Order Both Denying and Dismissing a motion for new trial, though somewhat inconsistent, must be considered as a dismissal, and proper, where, through inexcusable neglect of the moving party the motion has not been brought into condition for hearing.[1]

New Trial—Dismissal.—The Fact That Such a Motion can be brought to hearing, under Code of Civil Procedure, section 660, either by the moving or opposite party, after notice or affidavits, etc., does not prevent the opposite party applying for dismissal, where, through inexcusable neglect, the motion has not been brought into condition for hearing.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by P. C. Descalso against John Duane. Order denying and dismissing motion for new trial. Defendant appeals. Affirmed.

Moses G. Cobb for appellant; Stanly, Stoney & Hayes for respondent.

TEMPLE, C.—This appeal is from an order somewhat inconsistent in its terms, denying and dismissing a motion for a new trial. To deny a motion is to entertain and act upon it, and at the same time to end it, when, of course, it cannot be dismissed. A dismissal is a refusal to entertain it. The two forms were adopted because the decisions of this court have caused some doubt as to what is the proper remedy in case the moving party fails to prosecute his motion with reasonable diligence. In Quivey v. Gambert, 32 Cal. 305, it was held that an order dismissing a motion for a new trial, or striking

[1] **Cited** and approved in Smith v. American Falls Canal etc. Co., 15 Idaho, 95, 95 Pac. 1061, where the court declares a duty to be on the party prosecuting an appeal to have the statement settled within a reasonable time and in conformity with statute, and the motion for a new trial heard at the earliest day practicable.

out the statement, was not appealable, because though after final judgment in point of time, they did not follow it in legal sequence, or in the same line of procedure, and did not depend upon it. The court therefore recommended that the trial court let the motion proceed to the final hearing, and then deny it for failure to prosecute with reasonable diligence. In Calderwood v. Peyser, 42 Cal. 110, this rule is criticised, and the rule declared to be that any special order made after final judgment is appealable, the only test being the point of time. But the court still held that it was error to dismiss the motion for a failure to prosecute, but that the proper practice was to deny the motion. The legitimate penalty for failure to prosecute an action or proceeding would seem to be a dismissal, and if it be allowed to be regularly submitted for decision it is difficult to see why it should not be decided on its merits. This practice has sometimes been insisted upon since Calderwood v. Peyser, as in McDonald v. McConkey, 57 Cal. 325, and sometimes it has not been, as in Chase v. Evoy, 58 Cal. 348, in which it was said it makes no difference. In the present case the motion was not in a condition to be submitted, and the order must be considered as a dismissal. I think the practice was proper.

Appellant contends that such a motion cannot now be dismissed for failure to prosecute, because either party may bring the motion on to be heard: Code Civ. Proc., sec. 660. This section provides that the motion shall be heard at the earliest practicable period after notice of the motion, when made on the minutes of the court, or after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing by either party. But before either party can bring it on to be heard it must be in a condition in which it can be submitted; and if it is not, simply because of the inexcusable neglect of the moving party, the opposite party may apply for a dismissal. Here, after the statement had been agreed upon, the moving party was ordered by the court to have it engrossed. More than five months elapsed before the respondent made his motion for a dismissal, during which nothing was done. The statement was a short one, and could have been engrossed in two or three days. At the time no showing was made, explaining or excusing the delay, except that a few orders were procured,

extending defendant's time to engross the statement. It does not appear why these were required, or what right the court had to make them, but they do not cover the last two or three months of the period. I do not think we can say that the order dismissing the motion was an abuse of discretion.

Having reached this conclusion, it is not necessary to determine whether the papers used on the hearing were properly identified. There can be no doubt, however, that a bill of exceptions is a safe mode: Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299. It is required by rule 29 of this court. I think the order must be affirmed.

We concur: Searls, C.; Haynes, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order is affirmed.

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